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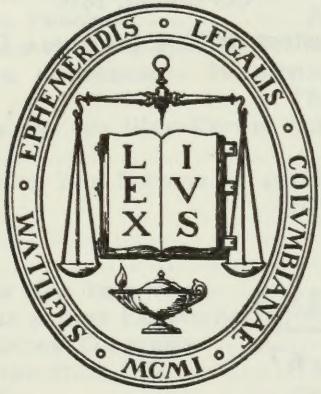

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PRIVATE ACTION FOR OBSTRUCTION TO PUBLIC RIGHT OF PASSAGE.

When is there a civil action, at common law, by a private person, for damage caused to him by the tortious obstruction of a public right of passage over a public way?[1]

At the outset, it seems expedient to give some explanation as to the scope of the discussion; and also as to the reason for frequently citing a line of authorities not directly in point.

The expression "a public way" is intended to include both land ways and water ways.[2]

The expression "tortious obstruction" is intended to include only cases where the obstruction is admitted or assumed to be unlawful. It is not intended to include: (1) cases where the question in dispute is whether the obstruction is or is not unlawful, *e. g.*, a dispute as to the constitutionality of a legislative act purporting to authorize the obstruction; nor (2) cases where the obstruction is admitted to be lawful. And yet, in discussing the main question as above framed, reference will repeatedly be made to decisions in cases falling under the two last mentioned classes; and the opinions in these latter cases will often deserve careful consideration in answering the main question.

This seeming anomaly is capable of explanation.

Many State Constitutions have been amended so as to prohibit, not only "taking", but also "damaging" or "injuring" property, unless compensation is provided for. Hence, to determine whether an act purporting to authorize the discontinuance of,

[1] The word "nuisance" is seldom used in this article, except in quotations.

[2] "The river is a highway, and as regards obstructions there appears to be no distinction between it and a highway on land." Moss, J. A., Drake *v.* Sault St. Marie, etc., Co. (1898) 25 Ont. App. 251, 258.

As to "public rights of way":

"They are of two kinds, for they exist either over highways or over navigable rivers. The law as to these two is essentially the same, and although we shall here speak specifically of highways only it will be understood that *mutatis mutandis* the same principles are for the most part applicable to navigable rivers also." Salmond, Torts (1st ed.) 268.

or substantial change in, a highway is constitutional, it is often necessary to decide whether property is "damaged". Again, many States have enacted statutes giving a remedy to persons who suffer "damage" from discontinuance of, or substantial change in, a highway, when such change is made under the authority of the State. And there is an important English statute giving a remedy to persons whose lands, or whose interests in lands, are "injuriously affected" by certain classes of authorized public works. In determining whether an abutter has been "damaged" within the meaning of the above described constitutional amendments or remedial statutes, it is common (whether strictly accurate or not) for courts to apply the test, whether the plaintiff could have maintained a common law suit if the defendant's acts had been done without lawful authority from the State.[3] Hence, decisions under such constitutional amendments or such remedial statutes (particularly the latter) are frequently cited in common law actions; and the same is true as to decisions in common law actions being cited in suits under such statutes. Thus *Smith* v. *Boston*,[4] was an action to recover damages under a remedial statute; but the opinion of the court in favor of the defendant in that case has exerted great influence as to the decision of common law actions.

Returning, after these explanations, to the main question:

It is now generally admitted that no private action can be maintained at common law, unless the plaintiff has sustained actual damage; meaning damage which involves appreciable pecuniary loss to him individually. The controversy is whether this goes far enough; or whether the law ought to further insist upon certain particular kinds of actual damage (upon certain exceptional classes of actual damage). Those who advocate the more stringent rule contend that, in the absence of these requirements, there is great danger of such a multiplicity of suits as would constitute an intolerable evil. The apprehension of such a result has exerted much influence upon courts; sometimes inducing a denial of recovery to a plaintiff who has suffered very substantial damage, but whose damage does not fall within certain exceptional classes.

Just what dangers are apprehended; and how far are the apprehensions well founded?

Some early views are brought out in the following often quoted passages from Coke's Reports and Coke upon Littleton:

[3] 1 Lewis, Eminent Domain (3rd ed.) § 199.

[4] (Mass. 1851) 7 Cush. 254.

"A man shall not have an action on the case for a nuisance done in the highway, for it is a common nuisance, and then it is not reasonable that a particular person should have the action; for by the same reason that one person might have an action for it, by the same reason every one might have an action, and then he [*i. e.* the defendant] would be punished 100 times for one and the same cause. But if any particular person afterwards by the nuisance done has more particular damage than any other, there for that particular injury, he shall have a particular action on the case; and for common nuisances, which are equal to all the King's liege people, the common law has appointed other courts for the correction and reforming of them."[5]

"For if the way be a common way, if any man be disturbed to goe that way, or if a ditch be made overthwart the way so as he cannot goe, yet shal he not have an action upon his case; and this the law provided for avoyding of multiplicity of suits, for if any one man might have an action, all men might have the like. But the law for this common nuisance hath provided an apt remedy, and that is by presentment in the leete or in the torne, unlesse any man hath a particular damage; as if he and his horse fall into the ditch, whereby he received hurt and losse, there for this special damage, which is not common to others, he shall have an action upon his case; and all this was resolved by the court in the King's bench."[6]

Two principal dangers seem to be apprehended from a recognition of the doctrine that any actually damaged person can sue.

Danger No. 1. That suits can be brought by each and every member of the entire community, even though the damage, in the case of most plaintiffs, would be purely theoretical.[7]

Danger No. 2. That suits, even if maintainable only by persons suffering actual damage, will be brought in an infinite number of cases by persons whose damage is extremely small in amount.

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[5] *Dicta* in Williams' Case (1592) 5 Coke *73a.

[6] Co. Litt. *56a; *cf.* 3 Bl. Comm. 219, and 4 Bl. 167.
"The meaning of Lord Coke, Blackstone, and other writers is, that while a common nuisance exists merely as a danger, there no individual can have an action, as all are in the same situation; but the instant a man is obliged to take even a circuitous route, the damage is peculiar to himself, because it is impossible that he sustains it in common with anyone." Argument of Mr. Dallas, in Hughes *v.* Heiser (Pa. 1808) 1 Bin. 463, 466.

[7] It seems to have been feared that any man, whether he had occasion to use the highway for any beneficial purpose to himself or not, might bring his suit. See 2 Wood, Nuisances (3rd ed.) § 683.

As to Danger No. 1.

This danger is purely imaginary. Any lawyer who thinks otherwise overlooks the distinction, between the requisites to a public prosecution of an obstruction as a crime, and the requisites to a private action of tort by an individual against the obstructor. To sustain a ciminal prosecution by the State, it is not necessary to prove that actual damage has been sustained by anybody; "it being sufficient that the obstruction is calculated to injure all who may chance to travel the way."[8] "An indictment would, of course, lie, although no person had ever wanted or tried to use the way since the [creation of the] obstruction, the *possibility* of inconvenience is sufficient."[9]

As a matter of legal theory, the law may be said to regard every member of the community as suffering damage whenever a public right is obstructed. But this theoretical damage, incurred in contemplation of law by the entire community, is not equivalent to actual damage involving pecuniary loss to an individual.[10] "If", said Chancellor Walworth, "he sustains no damage but that which the law presumes every citizen to sustain, because it is a common nuisance, no action will lie."[11]

A plaintiff cannot seek an apportionment of damage which he has only theoretically sustained in common with all other members of the public. He can sue only to recover for actual damage which he has individually sustained. ". . . one who suffers actual pecuniary loss or damage, to that extent suffers beyond his portion of injury in common with the public at large, and may have his private action."[12] If certain individual members of the public have suffered actual damage, a plaintiff, who is not one of the sufferers, cannot appoint himself their trustee to sue on their behalf. And if a plaintiff is one of several individuals

[8]1 Bishop, New Crim. Law, § 244, par. 3. State *v.* Narrows Island Club (1888) 100 N. C. 477, is directly in point.

[9]Judge E. H. Bennett, 19 Am. L. Reg. [N. S.] 624, 625. And see Bigelow, C. J., in Wesson *v.* Washburn Iron Co. (Mass. 1866) 13 Allen 95, 102.

[10]See Brown, J., Piscataqua Nav. Co. *v.* New York, N. H. & H. R. R. (D. C. 1898) 89 Fed. 362, 363.

[11]Lansing *v.* Smith (N. Y. 1829) 4 Wend. 9, 25. "Those who have no occasion of business or pleasure to pass over a road thus obstructed, and who have not attempted it, cannot maintain an action for the obstruction thereon." Appleton, J., Brown *v.* Watson (1859) 47 Me. 161, 162.

[12]Brown, J., Piscataqua Nav. Co. *v.* New York, N. H. & H. R. R. (D. C. 1898) 89 Fed. 362, 365.

who have each severally suffered damage, he cannot recover for the damage suffered by the others.[13]

As to Danger No. 2.—That suits, even if maintainable only by persons suffering actual damage, will be brought in an infinite number of cases by persons whose damage is extremely small in amount.

Two special evil consequences are foretold as likely to result.

One—Hardship on defendants, who may be overwhelmed by an infinity of suits.

The other—Incumbering the courts—clogging the dockets with a large number of "trivial" suits, thus hindering the progress of more important litigation.

As to hardship on defendants.

For reasons soon to be stated, we think that there will not be an enormous number of suits. But if there were, what special claim have the defendants to pity. *Ex hypothesi,* their acts were tortious.[14] If a rule of public policy, denying remedy, "shall become necessary, it certainly should be applied only when found necessary for the protection of the public and of the courts, and should not be given to a wrongdoer to defend himself from the natural consequences of his wrong."[15]

As to the danger of incumbering the courts, clogging the dockets, with a large number of "trivial suits,"[16] where the amount of actual damage is very small; thus hindering the progress of more important litigation:

It has been said that this objection proceeds upon the presumption "that a violation of the public right to the use of highways or navigable waters by unlawful obstructions therein will cause actual loss to so great a number of citizens that it is for the interest of the public that such citizens should suffer without legal redress, rather than that the courts should be incumbered with such amount of litigation as would result from private actions for actual special damages."[17]

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[13]See Burghen *v.* Erie R. R. (N. Y. 1908) 123 App. Div. 204.

[14]See Seymour D. Thompson, J., (1890) 41 Mo. App. 63, 82; Walworth, Chancellor, Lansing *v.* Smith (N. Y. 1829) 4 Wend. 9, 25.

[15]Brown, J., Piscataqua Nav. Co. *v.* New York, N. H. & H. R. R. (D. C. 1898) 89 Fed. 362, 365.

[16]See Allen, J., Davis *v.* County Commissioners (1891) 153 Mass. 218, 225.

[17]See Piscataqua Nav. Co. *v.* New York, N. H. & H. R. R. (D. C. 1898) 89 Fed. 362, 364, where Brown, J., says that the weight of authority does not justify such a "presumption".

We do not stop at this moment to consider whether the premise (the great number of cases of actual loss) is well founded, nor whether the conclusion (that remedy should therefore be denied in all cases of actual damage) is correct. It is enough for the present to call attention to the mistaken assumption that suits are likely to be brought in all cases of actual loss, however small the amount of loss. If it be granted that instances of actual loss of small amounts will be numerous, yet it does not follow that suits will be numerous. The danger of a multiplicity of suits is very much overestimated. The law as to costs, prevailing in most of our States, furnishes a very strong reason why such suits will not be frequent. The costs recoverable generally fall far short of making the plaintiff whole. They do not begin to equal the fees which he has to pay to his counsel. If he does not recover a substantial sum by way of damages, he is sure to be out of pocket by the litigation, although he has been the prevailing party.[18] It was probably in view of this pecuniary result to the plaintiff that Prof. Terry styled such actions "useless suits."[19] Where the damages recoverable are likely to be small, a prudent lawyer will generally refuse to sue in behalf of an impecunious client; and, if the applicant for his services is solvent, an honest lawyer will inform the applicant that he will lose money by suing, even though he should prevail. Under these circumstances, comparatively few suits are likely to be brought; except where there is a reasonable prospect of recovering substantial damages, or where a suit is brought to test the legality of an obstruction.

[18]The theory that the taxable costs afford a full compensation to the prevailing party is, in this country, a fiction; and courts have repeatedly repudiated it.

" . . . the costs, under our practice, awarded the prevailing party, are never sufficient to reimburse him for the actual cash expenses of the litigation, to say nothing of the loss of time and the inconvenience and trouble suffered." Morse, J., Brand *v.* Hinchman (1888) 68 Mich. 590, 597. " . . . we cannot, at this day, shut our eyes to the truth known by everybody, that taxable costs afford a very partial and inadequate remuneration for the necessary expenses of defending an unfounded suit." Church, J., Whipple *v.* Fuller (1836) 11 Conn. 582, 585. See also Sherwood, P. J., Smith *v.* Burrus (1891) 106 Mo. 94, 98; Corliss, C. J., Kolka *v.* Jones (1897) 6 N. Dak. 461, 467-468. In the above cited cases, the courts were specially considering the insufficiency of the taxable costs recoverable by a successful defendant. But the costs recoverable by a successful plaintiff are awarded on the same restricted scale, and are equally inadequate.

It is understood that in England costs are awarded on a more liberal basis. See Ross, J., Eastin *v.* Bank of Stockton (1884) 66 Cal. 123, 126; and 21 Am. L. Reg. [N. S.] 370.

[19]" . . . useless suits by persons who have suffered only nominal or very trifling damage." Terry, Principles of Anglo-American Law, § 527.

Thus far we have considered the objections to *permitting* the bringing of an action by a private individual who has been actually damaged.

But we must also consider the objections to *refusing* an action to such a person. The adoption of a rule making it a requisite that there should be particular kinds or classes of actual damage must not unfrequently result in denying remedy to a man who has sustained very substantial damage; which, however, does not fall within certain exceptional classes. And it must not unfrequently result in allowing a tort-feasor to escape civil liability, although his act has caused substantial loss. Do not these considerations outweigh the dangers to be reasonably apprehended from allowing suits for actual damage?[20]

It has been said, in argument,[21] that, "to avoid a multiplicity of suits, the law turns him to an indictment." But this would be a very unsatisfactory remedy to a damaged individual. In the criminal prosecution he would not, in the absence of special legislation, recover compensation.[22] If a fine is imposed, it goes into the public treasury. And if an order to the defendant to abate the obstruction is a part of the sentence, yet this gives no compensation for past damage. Nor would the individual sufferer be able to control the course of the prosecution, and determine when and how the charge should be tried; or, indeed, determine whether it should ever be tried at all. He would have no control over the District Attorney, who could *nol pros* the indictment or place it on file.[23]

We do not think that the apprehension of a multiplicity of

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[20]"A rule that prohibits such actions may tend to discourage litigation but does not tend to promote justice." Rudkin, C. J., 56 Wash. 303, 309.

[21]Hughes *v.* Heiser (Pa. 1808) 1 Bin. 463, 465.

[22]See Walworth, Chancellor, in Lansing *v.* Smith (N. Y. 1829) 4 Wend. 9, 25.

[23]In Wheeler *v.* Bedford (1886) 54 Conn. 244, the owner of a house fronting on a town common, its situation upon which greatly enhanced its value, was allowed to maintain injunction proceedings against his neighbor, who sought to destroy the common by enclosing a large part of it for his own use. The court said that it constitutes no answer to the bill, that there are statutes authorizing public authorities to remove encroachments. Defendant argued that the plaintiff could have redress by application to those authorities. "But suppose", said Park, C. J., p. 249, "the authorities are unwilling to institute proceedings. Where then will be the ample remedy? They are not bound to redress the plaintiff's private grievances. They act solely for the public, induced by public considerations, when they act at all. 'Adequate remedy at law' means a remedy vested in the complainant, to which he may, at all times, resort, at his own option, fully and freely, without let or hindrance."

suits, or of evil consequences resulting therefrom, justifies the denial of remedy by private action whenever an individual has suffered actual damage in the sense of appreciable pecuniary loss, no matter how small in amount. Such an apprehension seems "hardly justified by the experience of the courts of jurisdictions where for many years" there has been no such denial of remedy.[24] So far as the requirement of damage is concerned, actual damage ought to be sufficient. There are, however, authorities entitled to respect who insist that something more should be required. They think that remedy should be permitted only for certain particular kinds of actual damage. The alleged additional requirements have been stated in various forms or phrases, all of which must be examined. But it is desirable to first ascertain the exact meaning of the requirement of "actual damage".

The distinction between actual damage and purely theoretical damage has already been stated. As a matter of legal theory, the law may be said to regard every member of the community as suffering damage whenever a public right is obstructed. But this theoretical damage is not equivalent to actual damage involving pecuniary loss to an individual. "The law cannot adopt a presumption so opposed to experience as a presumption that actual pecuniary loss to every citizen follows a violation of public right."[25] "In each of these cases, as in the present case," said Brown, J., "the plaintiffs were in the actual use of the way, and were subjected to actual obstruction, and to actual loss additional to that which, by presumption of law, attaches to each member of the public. This actual loss, proved as a matter of fact, is the gist of the private action."[26]

The term "actual damage", as here used, means "an amount assessed as the equivalent of an actually proved loss, however small." Courts have sometimes "confused small but real actual damages with nominal damages." But the two conceptions are entirely distinct. "Nominal damages" really "mean no damages at all". "The term 'nominal damages' is a technical one which negatives any real damage, and means nothing more than that a legal right has been infringed in respect to which a man is

[24]See Brown, J., Piscataqua Nav. Co. *v.* New York, N. H. & H. R. R. (D. C. 1898) 89 Fed. 362, 365.

[25]Brown, J., Piscataqua Nav. Co. *v.* New York, N. H. & H. R. R. (D. C. 1898) 89 Fed. 362, 364.

[26]Brown, J., Piscataqua Nav. Co. *v.* New York, N. H. & H. R. R. (D. C. 1898) 89 Fed. 362, 363.

entitled to judgment."[27] "Damages are not necessarily nominal because they are small in amount." "Small damages awarded as compensation for an actually proved but slight loss are not nominal damages," though the amount assessed "may be trifling."[28] When, therefore, it is said that a plaintiff cannot recover where the damage is merely nominal, the meaning is, not that he cannot recover where there is actual damage to a very small amount, but that he cannot recover if there is no actual damage at all.

The weight of authority is very strong that a plaintiff, in this class of actions, cannot recover if the damage is merely nominal; *i. e.*, cannot recover in the absence of actual damage.[29]

In the rare instances where a recovery has been allowed although a judge has spoken of the damage as "nominal", the decision must be regarded as erroneous; unless the court can be understood as using the expression "nominal" in the improper sense of "actual damage to a very small amount."[30]

As to the meaning and correctness of the expressions, "special", "particular", or "peculiar damage".

One, or more, of these expressions are frequently used by judges and text-writers, where we should prefer to speak of "actual damage"; and they are sometimes used as if each constituted an additional requirement to "actual". "Special", which

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[27]In such a case the insertion in the record of a trifling sum as "damage" is a mere formal matter. See McKean *v.* Cutler (1869) 48 N. H. 370.

[28]See 1 Sedgwick, Damages (9th ed.) 164, 165, and note 5 on p. 165; Lord Halsbury, in Owners of the Mediana *v.* Owners of the Comet (1900) 82 L. T. Rep. [N. S.] 95, 96; s. c. [1900] A. C. 113, 116. See Mr. Bower's suggestion that it would be correct to use the term "damage" without the prefix "actual". Bower's Code of the Law of Actionable Defamation, 33, note p.

[29]McDonald *v.* English (1877) 85 Ill. 232, 234-246; Carpenter *v.* Mann (1863) 17 Wis. 155; Gordon *v.* Baxter (1876) 74 N. C. 470. "This distinction would be utterly confounded if a citizen who has sustained no particular damage was allowed to make himself the avenger of an injury to the public"—even if he purports to sue in behalf of himself and all other citizens of the State.

[30]It was probably used in this sense by the Trial Judge in Brown *v.* Watson (1859) 47 Me. 161, where the evidence showed actual damage; and the opinion of the higher court seems to have assumed its existence. The defendant could not complain if the plaintiff was willing to accept a smaller sum by way of damages than the amount to which he was entitled. In Esson *v.* M'Master (1842) 1 Kerr, New Brunswick, 501, the jury were told that no special damages had been proved; and that, if they found for the plaintiff, the damages would be merely nominal. After a verdict for the plaintiff, a rule for a new trial was discharged. But the verdict was for a substantial amount, *viz.*, forty-five shillings.

is the more common of the three,[31] seems the most objectionable on account of its ambiguity. It is used in reference to several distinct subject-matters, and has different meanings when used in different contexts. An eminent judge once said that its use, in a certain connection, tends "to encourage confusion in thought".[32]

These three expressions can each be understood in an unobjectionable sense. They may be taken to signify simply actual damage, as distinguished from merely theoretical or nominal damage. So they may be understood as denoting actual damage sustained by a particular person individually, as distinguished from a damage sustained by him in common with all members of the public.[33] Many persons may each suffer damage of the same description from one single obstruction, and "yet the damage be special to each of them".[34] "Though it is a sort of consequence likely to ensue in many individual cases, yet in every case it is a distinct and specific one."[35] "While the wrong must be special, as contradistinguished from a grievance common to the whole public, who have the right to use the highway, it may nevertheless be the common misfortune of a number or even a class of persons and give to each a right of redress. The amounts of the damage recoverable by them may vary according to the extent of the loss shown in each case, but every one of them may maintain his status in court by alleging and proving precisely the same sort of wrong caused by the same obstruction."[36]

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[31]Sir Frederick Pollock prefers "particular", and Judge E. H. Bennett prefers "peculiar". See Pollock, Torts (6th ed.) 387, note 3; and 19 Am. L. Reg. [N. S.] 626-627.

[32]See Bowen, L. J., in Ratcliffe *v.* Evans (1892) 2 Q. B. 524, 529. Also Bower's Code of the Law of Actionable Defamation, 33, note p.

[33]Lord Westbury seems to use "special damage" as synonymous with "individual particular loss", as distinguished from "damage which is sustained in common by all the subjects of the realm". See Ricket *v.* Metropolitan Ry. (1867) L. R. 2 H. L. 175, 203.

[34]See Sweeney *v.* Seattle (1910) 57 Wash. 678, 680.

[35]Pollock, Torts (6th ed.) 388.

[36]Avery, J., in Farmers' etc. Mfg. Co. *v.* Albermarle & Raleigh Ry. (1895) 117 N. C. 579, 586-587. And see Selden, J., in Milhan *v.* Sharp (1863) 27 N. Y. 611, 625-626.

In this connection attention may be called to Sir Frederick Pollock's statement (Torts (6th ed.) 387)—"A private action can be maintained in respect of a public nuisance by a person who suffers thereby some particular loss or damage beyond what is suffered by him in common with all other persons affected by the nuisance." Taking into account the context and illustrations, and also the "explanation" and illustrations of the learned author's draft of the Indian Civil Wrongs Bill, Pollock, Torts (6th ed.) 612, 613, we think that the author does not mean to require anything more than actual damage, which is a "distinct and specific" damage to the individual plaintiff. On page 388, he rejects the

But all these expressions ("special", "particular", or "peculiar damage") are objectionable, as giving some color to the erroneous idea that the damage must be exclusive; *i. e.*, that the plaintiff must be the only one to suffer damage of that description from the same cause. It is true, as we have just seen, that the damage of each must, in one sense, be peculiar to himself; but he need not be the only person who suffers that kind of damage from one and the same obstruction. Judges, however, sometimes seem influenced (unconsciously as it were) by the notion that if any person other than the plaintiff suffer the same kind of damage as the plaintiff, then there can be no recovery. The better view is that expressed by Brown, J.: ". . . although the defendant may be able to show that he has violated the theoretical right of every citizen, and that he has also inflicted upon several other citizens substantial damage and actual loss similar to that alleged by the libelants, such defense is without merit."[37]

The requirement that there must be, *at least*, actual damage, is not a merely formal matter; but is strictly enforced by courts, both so far as concerns allegations in pleadings or in special findings, and in regard to the method and sufficiency of proof by evidence.

"Interference with a common right is not of itself a cause of action for the individual citizen. Particular damage consequent on the interference is."[38] The burden is on the plaintiff to allege and prove actual damage to himself, "consequent upon his exercise of a public right being interfered with, and distinct from the fact that it is interfered with."[39]

It is not enough to allege that the defendant obstructed a

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view that the damage must be exclusive, *i. e.* he thinks it no objection that the same kind of damage suffered by plaintiff is suffered in many other individual cases. And it seems unreasonable to suppose that he means that the actual damage suffered by the plaintiff individually must (in order to sustain an action) be greater in amount than the actual damage suffered by any other person individually. It would seem rather that his language was intended to require actual damage as distinguished from theoretical damage; the meaning being similar to that of Brown, J., when he says (89 Fed. 365),—It is the better view "that one who suffers actual pecuniary loss or damage, to that extent suffers beyond his portion of injury in common with the public at large, and may have his private action."

[37]Piscataqua Nav. Co. *v.* New York, N. H. & H. R. R. (D. C. 1898) 89 Fed. 362, 365.

[38]Pollock, Torts (6th ed) 387.

[39]Pollock, Torts (6th ed.) 612: Explanation of Article 53 in Draft of Indian Civil Wrongs Bill.

public highway, without also alleging that the obstruction caused damage to the plaintiff.[40] It is not sufficient to allege that a road was wrongfully obstructed, so that the plaintiff was deprived of its use. This is not construed as an averment of special damage to plaintiff, but as an averment of the same deprivation to himself as existed in the public.[41] It is not enough to allege, in general terms, that the plaintiff was "damaged" or "specially damaged", or "suffered special injury", or was "peculiarly and particularly injured", by the obstruction. That is a mere conclusion of law. Plaintiff must make specific allegations as to what the damage consisted in, and how it was brought about.[42]

It is not enough to allege that the obstruction occasioned delay, inconvenience, or hindrance to plaintiff. It must further be alleged, in substance, that such delay, etc., caused actual damage to plaintiff, which involved pecuniary loss. Nothing must be left to implication.[43]

An allegation that, by reason of the obstruction, plaintiff was delayed or inconvenienced is not sufficient. There must be a further allegation that pecuniary damage to him resulted from the delay or inconvenience. So an allegation that, by reason of the obstruction, plaintiff was obliged to take a circuitous route, is insufficient. There must be a distinct allegation that pecuniary loss was thereby occasioned.[44]

Hurt done to plaintiff's religious sensibilities will not give an action. A, B, and others, being Mussulmans, are accustomed to carry *tabuts* in procession along a certain public road for immersion in the sea. Q unlawfully obstructs the road so that the *tabuts* cannot be carried along it in the accustomed manner. A and B have no right of action against Q.[45]

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[40]See Lowery *v.* Petree (Tenn. 1881) 8 Lea, 674, 678.

[41]Storm *v.* Barger (1892) 43 Ill. App. 173, 174.

[42]Sohn *v.* Cambern (1885) 106 Ind. 302, 304; Van Buskirk *v.* Bond (1908) 52 Ore. 234, 237. In Stone *v.* Wakeman, Noy 120, judgment was arrested, "Because he hath not shewn how he hath suffered any particular damage or losse by that stopper."

[43]The plaintiff avers that, in attempting to travel upon the way, he was hindered, etc., from passing along the way: "Be it so; no averment shows any specific damage from this hindrance; it does not appear that upon any special occasion he was thereby compelled to make a longer detour to reach a particular place where he had need to go, nor that he lost any time or was put to any expense thereby." Demurrer to declaration sustained. Holmes *v.* Corthell (1888) 80 Me. 31, 33.

[44]See McCowan *v.* Whitesides (1869) 31 Ind. 235.

[45]Satku *v.* Ibrahim (1878) Indian Law Rep., 2 Bombay, 457; Westropp, C. J., 468, 469. Cited in Pollock, Torts (6th ed.) 613.

Plaintiff, in proving his case, does not, as in defamation, receive aid from any presumption. His burden is not lightened by any artificial rule of law. It is not enough to prove the bare fact that he was hindered or delayed by the obstruction. He must prove the further fact that he suffered actual pecuniary loss by reason of such hindrance or delay. There is no presumption that actual pecuniary loss follows a violation of public right. "Actual loss, proved as a matter of fact, is the gist of the private action."[46]

Having thus endeavored to ascertain the exact scope of the requirement that there must be at least actual damage, we are now in a position to consider whether the law should require something more than actual damage; whether the law should insist upon certain particular kinds of actual damage. Those who affirm that actual damage is not, *per se,* sufficient ground for a private suit against a wrongful obstructer of a public way, differ somewhat as to the form of stating the alleged additional requirements. The most frequent form of statement (expressing it roughly and in general terms) is, that the damage to the plaintiff must differ in kind, and not merely in degree, from that sustained by the general public. But before giving extended consideration to this statement, it may be desirable to briefly discuss some other forms of statement.

It is sometimes said that there can be no recovery if the damage is "consequential".

The term "consequential damage" is an equivocal one. On the one hand, it is used to denote a damage which is so remote a consequence of an act that the law affords no remedy to recover for it. On the other hand, it is used to denote damage which, though actionable, does not follow immediately, in point of time, upon the doing of the act complained of. In the present discussion, it is used in the latter sense. We are now assuming the existence of actual damage; and are considering whether the law should insist upon certain particular kinds of actual damage. To require that the damage, though actual, must not be consequential, is to allow a defendant to escape because the damage, though distinctly traceable to the defendant's tort, did not follow

[46]See Brown, J., Piscataqua Nav. Co. *v.* New York, N. H. & H. R. R. (D. C. 1898) 89 Fed. 362, 363, 364.

immediately upon the commission of the tort. This ground is untenable.[47] The phrase "consequential damage" has never served any useful purpose except in marking a distinction between damage which was recoverable at common law in an action of case, and that which was recoverable in an action of trespass. When applied to questions of causation, it only produces confusion.[48] It should not be made a test of the right to bring a private action for the obstruction of a public way. As to this there is a conflict of authority, but the question seems very clear on principle.[49]

It is sometimes said, in substance, that the bare requirement of actual damage is not sufficient; but that the actual damage must be considerable in amount. (See 1 Street, Foundations of Legal Liability, 228.) It is virtually asserted that the law should require something more in degree or extent than actual damage of the smallest amount. But how much more? Here is the difficulty. There is no satisfactory way of fixing the *quantum*. The proposed rule is unworkable.[50]

As to one subject matter, the action of waste, the English

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[47]See the fuller discussion in 51 N. H. 519-521.

[48]See 25 Harvard Law Rev. 250-251.

[49]In favor of the view that there can be no recovery if the damage is "consequential": see Holt, C. J., Pain *v.* Patrick, Carth. 191, 194; Dunn *v.* Stone (1815) 4 N. Car. 261, 2 Car Law Repository, 261; Carey *v.* Brooks (S. C. 1833) 1 Hill Law, 365, 368; Steamboat Co. *v.* Railroad Co. (1888) 30 S. C. 539, 545, 548; Christian's note, 3 Bl. 220; and see Horton, C. J., 35 Kan. 611, 614.

In favor of the opposite view, that actual damage, though "consequential", is recoverable: see 3 Sedgwick, Damages (9th ed.) § 946; Judge Bennett in 19 Am. L. Reg. [N. S.] 637; 1 Bishop, New Crim. Law, § 265, par. 3; 1 Street, Foundations of Legal Liability, 226, 227; Tilghman, C. J., in Hughes *v.* Heiser (Pa. 1808) 1 Bin. 463, 469; Sharswood, J., in Penn. & Ohio Canal Co. *v.* Graham (1869) 63 Pa. 290, 296; 2 Wood Nuisances (3rd. Ed.) § 645, note 1.

[50]"If a direct particular damage be sustained, it seems that the exility of the injury is no objection to the action." Mr. Fraser, Editorial Note to Williams' Case, 5 Coke 73a (Eng. ed. of 1826).

"The right to maintain the action does not depend on the amount of the special damage provided the plaintiff suffered some material injury peculiar to himself." Vann, J., Flynn *v.* Taylor (1891) 127 N. Y. 596, 600.

"The extent of this peculiar injury is not of the slightest consequence so far as the right of action is concerned." Barnard, P. J., Crooke *v.* Anderson (N. Y. 1880) 23 Hun 266, 268.

"How small a damage actually incurred will support a private action is well illustrated by the case of Pierce *v.* Dart (N. Y. 1827) 7 Cow. 609." Plaintiff was obliged, on four occasions, to stop and pull down a fence across a highway. The loss to plaintiff did not exceed twenty-five cents for the whole four times.

Judge E. H. Bennett, 19 Am. L. Reg. [N. S.] 628.

courts long ago adopted an arbitrary limit; holding that the action could not be maintained if the damage assessed fell below three shillings and four pence.[51] But modern courts are not likely to fix such a limit in the case now in hand; and in the United States there might be constitutional difficulties in the way.

In some early reports as to private actions for obstruction of public ways, it was suggested that there must be "grand damage". But such a test presents the same practical difficulty as the word "considerable" suggested above.

We come now to the consideration of the most common form of statement; the alleged rule,—That, in order to maintain a civil suit for damage caused by an obstruction to travel upon a public way, the plaintiff's damage must be different in kind, and not merely in degree, from that sustained by the general public.

Other expressions are used which are synonymous with "the general public"; such as, "the public at large"; "the whole public"; "the entire community"; "the community at large". These expressions might not unnaturally be understood as equivalent to "all the citizens of the State who have a right to use the public way".[52]

As to the alleged general rule, there is a serious conflict of authority: first, as to whether it should be adopted; second, as

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[51] 3 Sedgwick, Damages (9th ed.) § 950; Bewes, Waste, 125-129.

[52] Sometimes, instead of using a broad term, such as "the general public", courts have substituted various expressions equivalent in effect to "that part of the public having occasion to use the obstructed way". And courts, although using the broader expression, sometimes apply the rule as though the narrower term had been employed.

It has generally been assumed that no individual can have a private action in a case where the entire public have suffered the same damage as the plaintiff. See Gregory, J., 31 Ind. 235, 237. This is true, where the damage "suffered" by everybody (plaintiff included) is mere theoretical damage. But suppose that a court adopts the above limited description of "the public", and then suppose that every individual member of this limited public suffers actual damage from the obstruction. Should each individual member of the public be denied compensation for his actual loss, because all the other individual members have also suffered actual loss? Of course, such a case would rarely occur; but its happening is conceivable.

"I do not think it is sound to say . . . that an injury which is shared by the public cannot support a claim for compensation. It is more sound to say that if the injury be specific and proved it is of no moment how many other premises are also injured." Lord Justice Clerk (Lord Moncreiff), in Walker's Trustees *v.* Caledonian R. R. (1881) 8 Sc. Sess. Cas. (4th Series) 405, 420.

to what interpretation and application should be given to it, in case of its adoption.

Many State courts profess to adopt the rule.[53]

On the other hand, the alleged rule is squarely rejected by the great weight of authority in the Federal courts.

The Federal authorities on this point are summarized as follows by Wellborn, J., in *Carver* v. *San Pedro, etc., R. R.* (C. C. 1906) 151 Fed. 334, 335:

"It is firmly established by a long line of federal decisions that an obstruction to navigable water may be enjoined by a private person who is injured thereby differently from the general public, either in degree or kind. *Georgetown* v. *Alexander Co.*, 12 Pet. 98, 9 L. Ed. 1012; *Pennsylvania* v. *Wheeling, etc., Bridge Co.*, 13 How. 564, 14 L. Ed. 249; *Union Pacific Railroad Co.* v. *Hall*, 91 U. S. 343, 355, 23 L. Ed. 428; *Baird* v. *Shore Line Ry. Co.*, 2 Fed. Cas. 427 (No. 758); *Works* v. *Junction R. R.*, 30 Fed. Cas. 626 (No. 18,046); *Hatch* v. *Wallamet Iron Bridge Co.* (C. C.) 6 Fed. 326; *Id.* (C. C.) 6 Fed. 780. This last case was reversed by the Supreme Court, but the reversal was on jurisdictional grounds, not affecting the point now under consideration. *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 2, 8 Sup. Ct. 811, 31 L. Ed. 629."

After commenting upon *Whitehead* v. *Jessup* (C. C. 1893) 53 Fed. 707, which is contrary to the great weight of Federal authority, the learned Judge continues:

"The just rule, it seems to me, is that relief should be granted in all cases where there is special injury to the complainant whether the injury complained of be different in kind from that of the public at large or only greater in degree, and this unquestionably is the doctrine of *Pennsylvania* v. *Wheeling Bridge Co., supra*, as the Supreme Court itself subsequently declared in the following unmistakable terms:[54]

" 'An application for a mandamus, not here a prerogative writ, has been supposed to have some analogy to a bill in equity for the restraint of a public nuisance. Yet, even in the supposed analogous case, a bill may be sustained to enjoin the obstruction of a public highway, when the injury complained of is common to the public at large, and only greater in degree to the complainants. It was in the Wheeling Bridge Case, 13 How. 518, 14 L. Ed. 249,

[53]See numerous cases cited in 37 Cyc. of Law and Practice, 250, n. 5; and in 21 Am. & Eng. Encyc. of Law (2nd ed.) 714, n. 1 and 3. To these authorities many more might be added.

[54]Union Pacific R. R. *v.* Hall (1875) 91 U. S. 343, 355.

where the wrong complained of was a public wrong, and obstruction to all navigation of the Ohio river.' "[55]

For other federal authorities, see *Piscataqua Nav. Co.* v. *New York, N. H. & H. R. R.* (D. C. 1898) 89 Fed. 362; s. c. (C. C. A. 1901) 108 Fed. 92; *Works* v. *Junction R. R.* (1853) 5 McLean 425; *Chatfield Co.* v. *New Haven* (C. C. 1901) 110 Fed. 788.

The alleged general rule is also distinctly rejected by various jurists.[56]

Furthermore, the alleged general rule is not recognized by various State courts, which render important decisions in favor of plaintiffs without professing to base them upon this rule. These courts, instead of professing to interpret and apply the alleged rule, virtually ignore it.

Among the courts which profess to adopt the alleged rule, there is a remarkable conflict of authority as to its interpretation and application. The existence of this conflict constitutes, in itself, a strong argument against the adoption of the rule. Another argument is found in the practical injustice resulting from the rule as interpreted and applied by some courts.

Speaking generally: one class of authorities construe the rule

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[55]Pennsylvania *v.* Wheeling, etc., Bridge Co. (U. S. 1851-1852) 13 How. 518, was not a criminal prosecution. The State was not suing in its sovereign capacity; but as a property owner by virtue of its proprietorship of certain canals which gave it a revenue interest in the navigation of the public river which the bridge obstructed. See McLean, J., at pp. 559, 561; also 176 U. S. 1, 19; and 108 Fed. 92, 94.

[56]"It is well, therefore, to look back to the older cases in which this exception was first established to ascertain the exact terms in which it is expressed.

"In *Iveson* v. *Moore* [1 Ld. Raym. 486] the language of the Judges in the Exchequer Chamber affirming the exception and establishing the right of action was, that 'the Plaintiff did necessarily suffer an especial damage *more than* the rest of the King's subjects.' In *Ashby* v. *White* [Smith's L. C. (4th ed.) vol. 1, 185, 212] the language was 'still if any person have sustained a particular damage *beyond* that of his fellow-citizens,' &c. The Judges do not say a damage of a *different kind or description* from that suffered by other subjects, but 'more than' or 'beyond' their fellow-citizens. The question then, is, whether when a highway is obstructed, the owners of those lands which are situated in a sufficient degree of proximity to it to be depreciated in value by the loss of that access along the highway which they previously enjoyed, suffer special damage 'more than' and 'beyond' the rest of the public. It surely cannot be doubted but that they do." Lord Penzance, Metropolitan Board of Works *v.* McCarthy (1874) L. R. 7 H. L. 243, 263.

See Seymour D. Thompson, J., in Charles H. Heer Dry Goods Co. *v.* Citizens Ry. (1890) 41 Mo. App. 63, 77; Bowden, J., in Gleason *v.* Schneider (1886) 7 Ky. L. Rep. 834.

in such a way as to excessively restrict private suits; while another class of authorities adopt a construction which leads, in a large proportion of cases, to the same practical result that would have been reached by applying the simple test of actual damage.

Taking the expression "the general public" in its broadest signification, it seems to us that the alleged rule might be understood to mean only that the plaintiff must prove actual damage to himself, as distinguished from the theoretical damage which, in contemplation of law, is supposed to be sustained by the entire community. Actual damage certainly differs in kind from mere theoretical damage. The statement, thus interpreted, would amount to this,—A defendant cannot escape liability for causing actual damage to an individual, on the ground that he has also, by the same obstruction, caused theoretical damage to all citizens of the State. This, instead of stating an additional requirement, would be merely a clumsy and roundabout way of repeating (restating) the actual damage test. But the foregoing view of the effect of the alleged general rule differs widely from that entertained by some courts.

Under the construction given to the alleged general rule by some courts, the maintenance of private actions is extremely restricted; and compensation is frequently denied to plaintiffs who have suffered very substantial damage. Courts which are inclined to narrowly restrict the private remedy are apt to construe the expression "the general public" as if it read "any other single member of the general public". And some of these courts construe the word "sustained" as meaning, either "actually sustained", or "liable to be sustained" ("which might have been sustained").

Acting upon these interpretations of the alleged rule, some courts virtually hold:—

Proposition One: That a plaintiff, although he has sustained actual damage, cannot maintain a civil action, if damage similar in kind or character to his had been actually sustained by any other single member of the public.[57]

[57]As examples of this doctrine, see the following:

In *Davis* v. *County Commissioners* (1891) 153 Mass. 218, 222, 224-225, the trial judge found that the petitioners' real estate "will be seriously and permanently injured by the carrying out of the order." The court, nevertheless, said that the petitioners would not be entitled to recover damages for the diminished value of their lands, "that being a loss not peculiar to themselves, but the same in kind as that which is suffered by others who owned lands situated upon the same street, or other streets contiguous thereto."

And some courts, going further, also hold:—

Proposition Two: That even though damage similar in kind or character to the plaintiff's has not, in fact, been sustained by any other member of the public, yet the plaintiff's action is barred if similar damage was liable to be sustained by any other member of the public. Or, in other words, plaintiff has no action, if damage of a similar character might have been incurred by any other member of the public, if he had attempted to use the way under the same circumstances that existed at the time of plaintiff's attempt.[58]

The first of the above propositions practically requires that the plaintiff's damage must be exclusive; *i. e.,* plaintiff cannot recover if any one else does in fact suffer damage of a similar character from the same obstruction.

The second proposition is practically prohibitive of a private

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In *Lansing* v. *Smith* (N. Y. 1828) 8 Cow. 146, 157-159, Sutherland, J., said:

" . . . that the special injury . . . must be peculiar to the plaintiff, and not common to him and many others; that if it operates equally, or in the same manner upon many individuals constituting a particular class, though a very small portion of the community, it is not a *special damage to each* within the meaning of the rule." It is not enough that plaintiff "should suffer more than the community generally, if he only suffer in common with a distinct class." But see the same case in error, 4 Wend. 9, 28.

[58]As examples of this doctrine, see the following:

Blackwell v. *Old Colony R. R.* (1877) 122 Mass. 1. Declaration alleged that a navigable river (an arm of the sea) was obstructed by the building of a bridge, whereby plaintiff, the owner of a parcel of land and a wharf above the bridge, was prevented from coming to the wharf from the sea in vessels as heretofore; that plaintiff's wharf was the only one above the bridge used for business purposes; and that plaintiff was compelled by the obstruction to abandon the use of his wharf for such purposes and to transport his goods over the defendant's railroad at an enhanced cost of $1000 a year. A demurrer to the declaration was sustained.

Gray, C. J., p. 3: "The fact that the plaintiff alone now navigates the stream, or has a wharf thereon at which he carries on business, only shows that the present consequential damage to him may be greater in degree than to others, but does not show that the injury is different in kind, or that other riparian proprietors and the rest of the public may not, whenever they use the stream, suffer in the same way."

Thomas *v.* Wade (1904) 48 Fla. 311. Plaintiff's steamboat was apparently the only vessel on a river large enough to be unable to get through the draw in a bridge, built after plaintiff had begun running the steamboat. Decision for defendant, by three judges against two.

Whitfield, J., p. 314: "There is no showing of injury or damage to complainant different in kind from that of any other person who might undertake to use the stream for purposes of navigation under similar circumstances."

Compare South Carolina Steamboat Co. *v.* South Carolina R. R. (1888) 30 S. C. 539, 542-543, 548.

action under almost all situations. "If", said Beatty, J.,[59] "what others might suffer under the same circumstances were made the rule, then in no case could it be said individuals ever suffer special damages from a public nuisance."[60]

Propositions One and Two are, one or both, denied by various courts which profess to adopt the alleged general rule. And they are also, as might have been expected, denied by other courts which have, either expressly or practically, repudiated the alleged general rule.[61]

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[59]Spokane Mill Co. *v.* Post (C. C. 1892) 50 Fed. 429, 432; approved in Morris *v.* Graham (1897) 16 Wash. 343, 345.

[60]As to possible exceptions, where actions might be maintained, even supposing the second proposition to be established law:—

In Silver Creek, etc., Co. *v.* Yazoo, etc., R. R. (1907) 90 Miss. 345, a bill was sustained in a case where plaintiff, an Improvement Company, had been granted, by the legislature, an exclusive right, for a term of years, to navigate a stream.

See also Chicago *v.* Webb (1902) 102 Ill. App. 232; and Bembe *v.* County Commissioners (1902) 94 Md. 321. But compare Atwood *v.* Partree (1888) 56 Conn. 80.

[61]As examples of such denial, see the following:—

"While the wrong must be special, as contradistinguished from a grievance common to the whole public, who have the right to use the highway, it may nevertheless be the common misfortune of a number or even a class of persons and give to each a right of redress. The amounts of damage recoverable by them may vary according to the extent of the loss shown in each case, but every one of them may maintain his status in court by alleging and proving precisely the same sort of wrong caused by the same obstruction."

Avery, J., Farmers, etc., Mfg. Co. *v.* Albemarle & Raleigh R. R. (1895) 117 N. C. 579, 586-587.

"While a property holder in order to recover damages for the obstruction or vacation of a public highway must suffer a special damage therefrom different in kind from that suffered by the general public, it is not the rule that he must suffer a damage peculiar to himself alone. Many persons may suffer a damage for one such single act, yet the damage be special to each of them."

Fullerton, J., Sweeney *v.* City of Seattle (1910) 57 Wash. 678, 680.

"But every individual who suffers actual damage from a common nuisance may maintain an action for his own particular injury, though there may be others equally damnified."

3 Sedgwick, Damages (9th ed.) § 946.

"It is not sufficient to defeat the right, however, that a large number of persons suffered special damage. If so, it would only be necessary for the company, when an injury has been inflicted upon one for which damage should be awarded, to inflict a like injury on many others in order to escape liability."

Cockrill, C. J., Hot Springs R. R. *v.* Williamson (1885) 45 Ark. 429, 441.

"I am of the opinion that . . . although the defendant may be able to show that he has violated the theoretical right of every citizen, and that he has also inflicted upon several other citizens substantial damage and actual loss similar to that alleged by the libelants, such defence is without merit."

Brown, J., Piscataqua Nav. Co. *v.* New York, N. H. & H. R. R. (D. C. 1898) 89 Fed. 362, 365.

To our mind, rejection of Propositions One and Two is justified. But by what method shall the law arrive at this result? By squarely rejecting the alleged general rule, and deciding each case by applying the single and simple test of actual damage? Or, by professing to adopt the alleged general rule, and then interpreting it in such a way as to preclude the affirmance of Propositions One and Two? We think the former method preferable. Under the latter method, the interpretation given to the rule by the courts brings about correct results. But these results might equally well have been obtained by discarding the alleged rule, and applying instead the simple test of actual damage. These courts, in theory, annex an additional requirement to the test of actual damage; and then construe the additional requirement in such a way that it does not affect the practical result, which is the same that would have been reached without it. If the court decides in favor of a plaintiff upon the ground that his damage

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If a plaintiff's damage "is of like kind with that of the general public, though greater, he cannot recover. But it must be borne in mind that the fact that others may be in the same situation with plaintiff as regards the effect upon the use of their property, yet that will not bring her within the rule preventing her recovery. There may be others in the same block as effectually cut off by the embankment as is the plaintiff; still she may recover. Others being in like situation with her and suffering the same kind of damage does not constitute the general community in the sense of the rule just stated."

Ellison, J., Ellis *v.* St. Louis, etc., R. R. (1908) 131 Mo. App. 395, 399.

"The fact that said obstruction injured others in like manner and degree as appellees is immaterial so long as the injury was peculiar to them, and did not embrace the public in general." Monks, J., Martin *v.* Marks (1900) 154 Ind. 549, 560.

" . . . the injury must be special and peculiar. It may be to more than one, but must not embrace the entire public." Gregory, J., McCowan *v.* Whitesides (1869) 31 Ind. 235, 237.

Injunction will be granted to prevent unlawful vacation of street, if the property of plaintiff, an abutting owner, "would thereby be depreciated in value, notwithstanding that it would affect many other landowners in the vicinity in the same manner." Texarkana *v.* Leach (1898) 66 Ark. 40.

In Spokane Mill Co. *v.* Post (C. C. 1892) 50 Fed. 429, the complaint alleges that, by obstructions placed in the river by defendant, the plaintiff is prevented from floating down the stream a lot of logs it now has just above such obstructions. Beatty, J., p. 432: "This was a special damage suffered in this particular instance, in which other members of the community did not share. It is true others would have suffered in the same way, perhaps to a different degree, had they attempted to run logs down the river; but if what others might suffer under the same circumstances were made the rule, then in no case could it be said individuals ever suffer special damages from a public nuisance." (Quoted with approval in Morris *v.* Graham (1897) 16 Wash. 343, 345.)

So in Page *v.* Mille Lacs Lumber Co. (1893) 53 Minn. 492, an action for obstruction to plaintiff's log-driving, the court would not deny recovery, because other persons might have been injured and damaged in the same manner and to the same extent, had they met the obstruction under like circumstances. Pages 499-500.

"differs in kind" from certain other classes of actual damage, we think that the decision turns upon an irrelevant issue. The crucial issue should be, whether the plaintiff has suffered actual damage of any kind or description which involves appreciable pecuniary loss.

The law is not obliged to choose between adopting the alleged general rule or having no rule at all to prevent "an intolerable multiplicity of suits". The alleged rule is in the nature of a supplement to, or qualification of, another rule, the existence of which is universally admitted; *viz.*, the requirement of actual damage. The alleged rule proceeds upon the assumption that there must always be actual damage. Its special, or additional, feature, consists in the assertion that actual damage, to justify recovery, must be actual damage of a certain kind, class or description. Obviously the rejection of the alleged rule does not involve the rejection of the rule requiring actual damage.

An illustration of the effect of adopting the above Propositions One and Two is afforded in cases where an obstruction has caused delay to a plaintiff, or has compelled him to take a circuitous route.

To the question whether delay, or compulsion to take a circuitous route, can give rise to (or constitute an element in maintaining) a private action, various answers have been made. The substance of three differing answers is here given:—

Answer 1. No; neither *per se*, nor as material elements to be considered in connection with other facts. No action lies, even though the delay or compulsion has resulted in actual damage to the plaintiff.[62]

Answer 2. The mere fact that plaintiff is delayed, or is compelled to take a circuitous route, will not support an action.

Literally, this is correct; but it is liable to misapprehension. On a superficial reading it might be taken to mean that delay, or compulsion to take a circuitous route, cannot constitute a material element in making out plaintiff's case, even when considered in connection with other facts (as to which see Answer 3).

Answer 3. While neither delay, nor compulsion to take a

[62]See, for example, Houck *v.* Wachter (1871) 34 Md. 265; Farrelly *v.* Cincinnati (Ohio, 1859) 2 Disn. 516.

It is generally true that damage of a character similar to plaintiff's either has been, or might have been, incurred by some other person. Hence courts which adopt Propositions 1 and 2 generally hold that no action is maintainable. For a representative case, see Nichols *v.* Richmond (1894) 162 Mass. 170, 173.

circuitous route, is sufficient *per se* to support an action, yet, if such delay or compulsion caused pecuniary loss to plaintiff, then an action lies. There is, however, no presumption that pecuniary loss resulted. Such loss must be properly alleged and actually proved.

This answer is, we think, substantially correct.[63]

But the limitations stated in Answer 3 must be carefully noted. The fact that one travelling on the highway is prevented by an obstacle from pursuing the most direct route will not necessarily and invariably cause pecuniary damage to him. If he is travelling for health or pleasure, a circuitous route may serve his purpose just as well as the more direct; and, even though absolutely prevented from completing his journey he may not thereby suffer any pecuniary loss. Or, if he is travelling upon a business undertaking, the circuitous route, though longer in actual distance, may be preferable, having a better road-bed and easier grades; being in fact the route generally used by business travellers.

(TO BE CONCLUDED.)

JEREMIAH SMITH.

CAMBRIDGE, MASS.

[63]See the following authorities: Rose *v.* Miles (1815) 4 M. & S. 101; Greasly *v.* Codling (1824) 2 Bing. 263; Hart *v.* Basset (1672) T. Jones, 156; Chichester *v.* Lethbridge (1738) Willes, 71; Blagrave *v.* Bristol Water Works Co. (1856) 1 Hurl. & Norm. 369; Milarkey *v.* Foster (1877) 6 Ore. 378; Brown *v.* Watson (1859) 47 Me. 161. See also Pittsburgh *v.* Scott (1845) 1 Pa. St. 309, 319-320.

Plaintiff "sustained actual pecuniary loss because of being compelled to take a roundabout route in order to avoid the obstruction." Pitney, J., in Ryerson *v.* Morris, etc., Co. (1903) 69 N. J. L. 505-508.

The referee found that the obstruction compelled plaintiff to take a longer route, "to his pecuniary damage". Wakeman *v.* Wilbur (1895) 147 N. Y. 657.

(In the three following quotations, the italics are ours.)

" . . . mere personal inconvenience caused by the plaintiff being delayed by an obstruction in the highroad, *without pecuniary damage,* will not suffice." Clerk & Lindsell, Torts (2d ed.) 341.

" . . . mere delay caused by an obstruction, *unaccompanied by special injury*, does not, as a rule, give any right to an action for special damages." 2 Elliott, Roads and Streets (3rd ed.) § 854.

"The mere fact that a person is delayed or compelled to take a circuitous route by an obstruction in the highway, does not *necessarily* constitute special damage." Peabody, J., Smart *v.* Aroostook Lumber Co. (1907) 103 Me. 37, 50.

"And, first, as to an action for mere delay or deviation caused by the obstruction. Thus inconvenience merely does not sustain a private action . . . Passing from the mere delay or inconvenience of taking a different route, it seems equally clear that if such delay does cause peculiar damage, either to the person or property of the plaintiff, this gives a right of action." Judge E. H. Bennett, 19 Am. L. Reg. [N. S.] 625-627.

THE MAGIC OF THE PRIVATE SEAL.

The history of the seal and how it came to play such an important part in our substantive law through its use in attesting documents at a time when people could not write, and the leading rules which have grown up out of such use are known to every lawyer.

But the various changes and modifications which have taken place in the law of New York regarding the seal and the exceptions which have arisen in an effort to evade the harshness and rigor of the first few simple principles of specialties and the absurdities to which these rules and exceptions have now led us are not so fully understood. It is the purpose of this article to summon attention to the complex condition of our present law applicable to sealed instruments.

Beginning with the law as it was at the time of Chancellor Kent, which required the seal to be an impression on wax, we find him giving expression, in *Warren* v. *Lynch*,[1] to the following:

"A scrawl with a pen is not a seal, and deserves no notice. . . . The calling a paper a deed will not make it one, if it want the requisite formalities. . . . The policy of the rule consists in giving ceremony and solemnity to the execution of important instruments, by means of which the attention of the parties is more certainly and effectually fixed, and frauds less likely to be practiced upon the unwary."

A seal at common law was an impression upon wax or wafer or some tenacious substance capable of being impressed, and it was to the use of such formality that the Chancellor made reference. In his Commentaries,[2] referring to the scroll as a substitute for the seal, he had this to say:

"This is destroying the character of seals, and it is, in effect, abolishing them, and with them the definition of a deed or specialty, and all distinction between writings sealed, and writings not sealed. . . . To abolish the use of seals by the substitution of a flourish of the pen, and yet continue to call the instrument which has such a substitute, a deed or writing, sealed and delivered within the purview of the common or the statute law of the land, seems to be a misnomer."

This remained the law of this State until the enactment of § 13 of Chapter 677 of the Laws of 1892, known as § 44 of the General Construction Law, reading:—

[1](N. Y. 1810) 5 Johns. 238.

[2]Vol. 4, *453.

"The private seal of a person, other than a corporation, to any instrument or writing shall consist of a wafer, wax or other similar adhesive substance affixed thereto, or of paper or other similar substance affixed thereto, by mucilage or other adhesive substance, or of the word 'seal,' or the letters 'L. S.,' opposite the signature."[3]

The use of the wax or adhesive substance required by the common law, while not modified until 1892 as just stated, was relaxed as to the seals of courts and public officers, in 1829, by the Revised Statutes,[4] so as to enable the impression to be made directly upon paper; and by the Laws of 1848, Chapter 197, a corporation was permitted to make a like use of its seal.

Formerly, unless a deed of a fee were sealed and the copy of it as recorded showed that a seal had been affixed the title to the property was held to be defective and unmarketable.[5] Since the real property law,[6] however, a seal is no longer necessary to any conveyance of real property.[7]

This, briefly, outlines the statutory changes which have been made regarding the nature and necessity of the private seal. At the present day, its use is not required to give validity to instruments, unless it be in the case of a release or a bond, and as to the latter the failure to use a seal would not render the bond void, but would reduce it to a simple contract as will later appear. Of course there may be special statutes requiring the seal in particular cases; but these generally refer to corporations.

While the necessity for the private seal has virtually gone, its use still remains, with many serious and ensnaring effects. A study of the cases will convince one that people make use of the printed or written "L. S." without fully appreciating its effect.

Perhaps the earliest inroad into the rigors of the common law regarding sealed instruments was the Statute of 1829, regarding consideration. At common law an instrument under seal did not require a consideration. The books frequently spoke of a seal as implying a consideration; but the correct statement of the rule

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[3]See Curtis *v.* Leavitt (1857) 15 N. Y. 9; Town of Solon *v.* Williamsburgh Savings Bank (1889) 114 N. Y. 122.

[4]2 R. S. 404, § 61 (1829).

[5]Todd *v.* Union Dime Savings Institution (N. Y. 1887) 20 Abb. N. C. 270, reversed on facts (1890) 118 N. Y. 337.

[6]Laws of 1896, c. 547, § 243.

[7]Leask *v.* Horton (N. Y. 1902) 39 Misc. 144; Stanton *v.* Granger (N. Y. 1908) 125 App. Div. 174; Fitzpatrick *v.* Graham (C. C. A. 1903) 122 Fed. 401.

is that a sealed instrument required no consideration.[8] By the Revised Statutes,[9] a seal upon an instrument became only presumptive evidence of a consideration which could be rebutted, and this was continued in our Code of Civil Procedure, § 840, as to executory instruments. Under this change in the law a deed and a general release are held to be executed instruments when delivered and the seal conclusive evidence of consideration.[10] A mortgage, on the other hand, has been held to be an executory instrument within the meaning of this section, so that the presumption of a consideration arising from the seal may be rebutted and the instrument declared void for want of consideration.[11] This distinction between the effect of the seal, as to consideration, upon executory and executed instruments is not always appreciated.[12]

Equity did not always give to the seal the same importance as the common law, and where by the latter a seal was necessary to give validity to the instrument, the former would sometimes give its aid to relieve from the effects of a failure to seal. Thus in the early case of *Wadsworth* v. *Wendell*,[13] one John Thomas, a soldier, signed what purported to be a conveyance reciting that he had set his hand and seal thereto, but without in fact having affixed the seal. The opinion stated:

"Though it be a defective conveyance, for want of a seal, yet it created such an equity as to bind the lands in the hands of the soldier and of his heirs. . . . It was not intended to be an agreement only to convey, but an actual present conveyance of all his right and title; and, in equity, it did pass it. The omission to affix a seal, was a mere mistake, contrary to the intention of the parties, . . ."

This was followed in *Grandin* v. *Hernandez, Town of Solon* v. *Williamsburgh Savings Bank, and Barnard* v. *Gantz*.[14] The Town of Solon case related to certain county bonds which were improperly sealed. They had been issued in aid of the Utica, Chenango and Cortland Railroad Company through proceedings had for that purpose before the County Judge. The statute provided that it should be the duty of the commissioners to execute

[8]Holmes on the Common Law.

[9]2 R. S. 406, § 77.

[10]Stiebel *v.* Grosberg (1911) 202 N. Y. 266.

[11]Baird *v.* Baird (1895) 145 N. Y. 659.

[12]See Fuller *v.* Artman (N. Y. 1893) 69 Hun 546; Baird *v.* Baird (1895) 145 N. Y. 659, 665.

[13](N. Y. 1821) 5 Johns. Ch. 224.

[14](N. Y. 1883) 29 Hun 399; (1889) 114 N. Y. 122; (1893) 140 N. Y. 249.

the bonds of a municipal corporation attested by the seal of such corporation affixed, if it had a common seal, and if not, then by their individual seals and signed and certified by them. As the Town had no seal the commissioners put "L. S." opposite their names which under the law as it then existed was no seal at all. The court said:

"Inasmuch as they [the bonds] were issued and delivered by the commissioners in the performance of their duty and upon a consideration, the mistake or failure to affix their seals does not defeat the enforceable validity of the bonds. At all events, as the commissioners intended to properly and effectually execute the bonds, and the omission of the seals was caused by their misunderstanding, mistake or inadvertance, the court of equity may afford the relief requisite to the party justly entitled to the benefit of the instruments, and to render them enforceable."

The facts in the Barnard case are even stronger in showing to what extent a court of equity has gone in disregarding a fundamental rule of sealed instruments. A deed of trust, properly sealed, executed and delivered, was sought to be revoked by an unsealed instrument. Judge O'Brien, in the opinion, said:

"It is urged that the instrument of revocation is inoperative to annul a deed, as it was not under seal and was not delivered, upon the principle that a deed can only be modified or revoked by an instrument of equal solemnity. The signature to the paper is followed by the letters L. S. in brackets. She evidently intended to seal the instrument, and where that intention is manifest upon the paper itself, a court of equity will assume that it is sealed or grant the same relief as though a common-law seal was attached."

Then follow words which weaken still further the law regarding sealed instruments, or engraft upon it an exception which renders the seal in such instances mere surplusage:

"The instrument, however," continues Judge O'Brien, "which transferred the bonds to the trustees and beneficiaries, though under seal, was a mere assignment of personal property, and would have been precisely as effectual if no seal had been affixed. The seal, therefore, added nothing to the solemnity, force or effect of the instrument, and if a provision for future revocation was intended to be inserted, so as to make it revocable in fact, that result could have been accomplished by any instrument, in writing, signed by the party authorized to revoke."

Where the authority to revoke exists, can a power to convey a freehold granted by an instrument under seal be revoked by an unsealed writing now that the seal is no longer necessary to a

deed in fee? In *Farrington* v. *Brady*,[15] it was decided that an executory contract under seal cannot be modified or released before breach by an unexecuted parol agreement, but that a written contract not under seal may be.

The affixing of the seal, said Chancellor Kent, is a formality calling the attention of the signer to the importance of the document, and giving dignity to the transaction. This purpose is certainly not accomplished by the rule that one seal may be adopted by many parties. Thus in *Rusling* v. *Union Pipe and Construction Company*,[16] the contract was signed "Union Pipe & Construction Co., by Calvin Detrick, Pres't," as one of the parties, and by Joseph L. Rusling, as the other party. The seal appeared opposite Rusling's name only, and yet it was held to be the seal of the corporation, making applicable the twenty years statute of limitations. The formality which raises simple contracts to the dignity of specialties may thus open the way for deception and fraud. Even in such a case, however, should it be proved that the letters "L. S." or the scroll were annexed to the instrument after its execution and were therefore not the seal of any of the other parties to it, the act might be regarded as such an alteration of the instrument as to avoid it both as a specialty and as a simple contract.[17]

It has been an elementary proposition that authority to execute a sealed instrument must also be in writing and under seal. Does this apply to all sealed instruments and, if not, why and where has the modification of the rule arisen? In *Worrall* v. *Munn*,[18] we read the following:

"It is a maxim of the common law that an authority to execute a deed or instrument under seal must be conferred by an instrument of equal dignity and solemnity; that is, by one under seal. This rule is purely technical. A disposition has been manifested by most of the American courts to relax its strictness, especially in its application to partnership and commercial transactions. I think the doctrine as it now prevails may be stated as follows, viz.: if a conveyance or any act is required to be by deed, the authority of the attorney or agent to execute it must be conferred by deed; but if the instrument or act would be effectual without a seal, the addition of a seal will not render an authority under seal necessary, and if executed under a parol authority or subsequently

[15](N. Y. 1896) 11 App. Div. 1; and see Wheeler *v.* Reynolds (N. Y. 1899) 44 App. Div. 571.

[16](N. Y. 1896) 5 App. Div 448.

[17]Metropolitan Life Insurance Co. *v.* McCoy (N. Y. 1886) 41 Hun 142; Siefke *v.* Siefke (N. Y. 1893) 3 Misc. 81.

[18](1851) 5 N. Y. 229.

ratified or adopted by parol, the instrument or act will be valid and binding on the principal. It is said that the rule as thus *relaxed* is confined in its application to transactions between partners; but it seems to me, that a distinction between partners and other persons in the application of the rule as relaxed and qualified by recent decisions, stands upon no solid foundation of reason or principle."

Who, we may ask, has been relaxing the principles of the common law? Clearly, the judges, when they have found "no solid foundation of reason or principle" to sustain them. This case was followed by *Ford* v. *Williams* and *Wood* v. *Wise*.[19] In the latter case an agent signed the principal's name to a contract to sell real estate and affixed a seal. As a seal was unnecessary to such a contract, the authority of the agent to sign the principal's name was proved by parol. A question naturally arises here regarding a bond. To be a bond the instrument must be sealed, and no unsealed instrument can be a bond, although it may be good as a simple contract.[20] This question, then, suggests itself: Must the authority of an agent to execute a bond be in writing and under seal, and if the instrument appears to be a bond executed by an agent and it turns out the agent's authority was not under seal, but by parol, would the bond be unenforceable or be good as a simple contract? Whether or not this has been answered by the case of *Peterson* v. *City of New York*,[21] need not be determined here. In that case the Aqueduct Commissioners had executed a contract for the City of New York under seal. The statute of limitations was pleaded and it was held in the lower courts that the action was barred by the six years period applicable to simple contracts, as the commissioners had no authority to annex a seal. The Court of Appeals took a different view and held that by usage, as well as under the Statute appointing the commissioners, they had authority, and that the twenty years statute of limitation applied, pursuant to § 381 of the Code of Civil Procedure. The agent's authority, therefore, is always an open question of fact in determining the effect which the seal shall have upon the instrument. If he had no authority to annex the seal it is a simple contract. If he had authority it is a spe-

[19](1856) 13 N. Y. 577; (N. Y. 1912) 153 App. Div. 223, affd. (1913) 208 N. Y. 586.

[20]People *v.* Wiley (N. Y. 1842) 3 Hill 194, 212; United States *v.* Stephenson's Exrs. (C. C. 1839) 27 Fed. Cas. 1305, 1306; Board of Education *v.* Fonda (1879) 77 N. Y. 350.

[21](1909) 194 N. Y. 437.

cialty, and we may assume that if that specialty is one which the law requires to be sealed the agent's authority must also be under seal. This case, however, did not deal with bonds, which, in their nature, must be under seal. In his opinion Judge Cullen took occasion to say that, "Though in many respects the effect of a seal has by recent statutes and decisions been very much impaired, nevertheless a sealed instrument still retains in law certain characteristics peculiar to itself."

Speaking of bonds, we may note another peculiarity in the law which has already been touched upon, and that is that where a statute requires a bond to be given, which of course implies a seal, yet an instrument executed in the nature of a bond but without a seal may, if acted upon, create a liability. In the Fonda case, above referred to, the defendant was elected treasurer of the Fairport Union Free School under an act of the Legislature which required him to give a bond, and provided that if no bond were given within ten days the office would be deemed vacant. The purported bond which was furnished was not sealed as required by law at that time. Judge Folger said:

"The writing upon which this action is brought is not a bond. It is in the fashion of one. It has a penalty and condition. It recites that it is under the hands and seals of the obligors. Yet there are no seals to it. There are places for them; and the letters L. S. to each name, which mark those places but do nothing more. It is not an instrument in strict compliance with the statute. When the Legislature said a bond, it meant a bond; which is a form of taking security well known to the law; from its characteristics having some sanctions not shared in by all written obligations, and thereby affording a more complete and binding, and higher form of security."

The instrument, however, was held to be a simple contract binding upon the sureties. In a previous case, *Kelly* v. *McCormick*,[22] an unsealed bail bond upon which a prisoner had been discharged was held good as a simple contract; but in *Tiffany* v. *Lord*[23] it was held that the giving of a bond in the form prescribed by the statute in relation to the Justice's Courts was necessary to confer jurisdiction upon the Marine Court of the City of New York to issue an attachment, and that an instrument without a seal was insufficient, and an attachment issued thereon was void.

In *Warrell* v. *Munn*,[24] above referred to, it had been stated

[22](1863) 28 N. Y. 318.
[23](1875) 65 N. Y. 310.
[24](1851) 5 N. Y. 229, 238.

that the instrument in question did not require a seal, was therefore an unsealed instrument in law although sealed in fact, and that the agent's authority to execute it could be proved by parol. It was further held that a conditional delivery of an executed instrument, although not required to be sealed, could only be made to a stranger and could not be made to a party. This was not followed in *Blewitt* v. *Boorum*,[25] where the doctrine was limited to such instruments as were by law required to be under seal. Judge Peckham speaks of them in his opinion as deeds conveying real estate or an interest therein, or agreements for the sale thereof. The action was brought upon a contract under seal, the defense being a delivery to the other party not to take effect as a contract until the happening of a certain event. The opinion limits or extends the rule of the Warrell case, as follows:—

"The instrument in this case was an ordinary agreement, not requiring a seal for its validity, and we think the rule as to sealed instruments, *however far it may be carried in regard to such instruments as require a seal for their validity*, should not be extended in any event to those cases where the instrument is in law not in the nature of a specialty, and where the presence of a seal is totally unnecessary to its validity."

This was written in 1894. In 1896 it became unnecessary to seal conveyances of real estate. Would this language so fit the case of an unsealed conveyance in fee as to now permit the conditional delivery thereof to the grantee? Probably not; but the reason would no longer depend upon the presence or absence of the seal, or the letters "L. S.," but more logically upon the nature of the transaction.[26]

The release is of equal dignity and importance with a deed to real estate. It requires a seal and, being an executed and not an executory instrument, the seal is conclusive evidence of a sufficient consideration. The release, therefore, is in the same class with the deed of real estate under the common law. But while a deed may not be given to the grantee in escrow or upon conditions, there may be a conditional delivery of a release to the debtor. The reason given for this distinction is to be found in *Stiebel* v. *Grosberg*.[27] The distinction which was there attempted to be made between the two instruments is not very convincing, and the grounds for it can hardly be said to be impressive. "A release,"

[25](1894) 142 N. Y. 357.
[26]Hamlin *v.* Hamlin (1908) 192 N. Y. 164.
[27](1911) 202 N. Y. 266, 273.

says the opinion, "or receipt, however, is perfectly good without a seal, provided the holder can show that full payment has been made therefor." When a holder can show full payment he needs neither receipt nor release.

The development of the rules appertaining to seals when annexed to promissory notes is indeed interesting. A seal to a note makes it a specialty. In *Clark* v. *Farmers' Woollen Manufacturing Company,*[28] it was held that a note for the payment of money under seal is not negotiable and that the effect of affixing the seal of a corporation is the same as when a seal is affixed by an individual; it raises the instrument to a specialty. In the case of *Weeks* v. *Esler,*[29] the Electric Power Company executed promissory notes upon which was impressed a corporate seal. Of course, if this were a sealed instrument it lacked the elements of negotiable paper, and so the defense was that the notes were sealed and non-negotiable. The court was face to face with a sealed promissory note, and how was it to meet the situation? In this way, quoting from the language of the opinion:—

"We agree with the learned justices below that, in the absence of any recital that the seal of the corporation was affixed and of any evidence to show the fact of sealing, or that the corporate seal was impressed, or that it was, in fact, the corporate seal which thus appeared, these notes could not be regarded as sealed instruments . . . Assuming that the presence of the corporate seal upon such an instrument, or note, could affect its negotiability,—a proposition as to which we entertain grave doubts, but which we do not feel called upon now to determine—we think that its mere presence, unaccompanied by a single fact evidencing that the company's officers intended to, or did, affix it, was quite insufficient to have any effect upon its apparent character."

A year and a half later there came before the same court the case of *Chase National Bank* v. *Faurot.*[30] The facts were similar to those of the Weeks case and the same defense was pleaded, and, while the decision reached was the same, the court liberalized its views regarding the effect of the seal.

"In the case at bar," says the opinion, "we shall assume for the purposes of this appeal that the note in suit was a sealed instrument, and will place our decision on broader grounds than those laid down in *Weeks* v. *Esler* . . . In view of the law as settled by this court and the courts of other jurisdictions as to

[28](N. Y. 1836) 15 Wend. 256.

[29](1894) 143 N. Y. 374.

[30](1896) 149 N. Y. 532.

what instruments are negotiable, we hold that the commercial paper of a corporation negotiable in form does not lose the quality of negotiability by having attached thereto the corporate seal."

The relaxation of this rule as to corporations has not been extended to individuals,[31] and it still remains the law that a promissory note sealed by the maker becomes a specialty and ceases to be commercial paper; but even then the presence of the seal is not conclusive and the rule is of doubtful application. In the *Matter of Pirie,*[32] it appeared that the promissory note in question bore the signature of Adele M. Downing and after the signature a seal. Was it an instrument to which the six years or twenty years statute of limitations applied? This is the answer expressed in the opinion:

"There is nothing in the body of the note or of the signing of it which indicates that it was intended to be a sealed instrument. Ordinarily a seal affixed to a paper in the form of a promissory note changes it into a sealed instrument, which, under the Statute of Limitations, may run for twenty years; but the mere attaching of a seal after the signature does not raise a presumption that the note is a sealed instrument, unless there be a recognition of the seal in the body of the instrument, by some such phrase as 'witness my hand and seal' or 'signed and sealed.' The reason for this is that the mere attaching of a seal after a signature without any recognition of it in the body of the note or in connection with the signing, *in the absence of evidence showing the time when, and the person by whom, the seal was affixed,* would open the door to frauds and forgeries and enable evil disposed persons to prevent the running of the six years' Statute of Limitations, by merely attaching at the end of the note a seal. Under such circumstances a seal is regarded merely as surplusage and the character of the note is not changed."

The opinion, however, quotes with approval a West Virginia case which held:

"To constitute a sealed instrument, there must be a seal or scroll affixed, and some recognition of it in the instrument, or some evidence of it *aliunde*; but it can never be maintained that such evidence, whether by the proof of witnesses or acknowledgment of the party, will not supply the place of such recognition."

We have it then that a promissory note with "L. S." after the name of the maker is not a sealed instrument and that the six years statute of limitation applies, but that oral evidence may show that the letters were put on at the time of the making and

[31]Chase National Bank *v.* Faurot (1896) 149 N. Y. 532, 536.
[32](1910) 198 N. Y. 209, 214.

then it becomes a sealed instrument to which the twenty years limitation applies. Is it not difficult to determine which rule presents more readily the opportunity for fraud, that which presumes the seal to have been annexed by the maker, or that which presumes the contrary?

Another incident regarding notes and sealed instruments is marked in the case of *Hulbert* v. *Clark*,[33] where it was decided that although eight promissory notes of $500 each were barred by the six years statute of limitations and there could be no recovery whatever upon the debt, yet the mortgage under seal given to secure these notes, although containing no covenant to pay them, could be foreclosed any time within twenty years. The same rule was applied in *Dinniny* v. *Gavin*.[34]

However much the courts in some instances have relaxed the rules of the common law upon this subject, they have adhered very strictly to the principles enunciated in *Briggs* v. *Partridge*,[35] that none but the parties can be held to a sealed instrument. Whether the rule crystalized out of the reasoning or out of the incidents of such cases as *Lawrence* v. *Taylor*, *Townsend* v. *Hubbard*, and *Randall* v. *Van Vechten*,[36] is not now important to determine, as it is here to stay for the present, in spite of the numerous efforts of the Bar to ameliorate it. The state of the law today upon this point is as follows: A principal may be charged upon a written parol executory contract entered into by an agent in his own name within his authority, although the name of the principal does not appear in the instrument and was not disclosed, and the party dealing with the agent supposed that he was acting for himself; and this doctrine obtains as well in respect to contracts which are required to be in writing, as to those where a writing is not essential to their validity. If, however, a seal be put to the instrument, agency cannot be proved nor the real principal held. Thus, if an unsealed contract to sell real estate is signed by the agent in his own name, and the fact that he is acting for another and not for himself appears nowhere upon the face of it, the real principal can always sue and be sued upon the instrument. But if it should happen that the printed letters "L. S." appear after the agent's name, all

[33](1891) 128 N. Y. 295.

[34](N. Y. 1896) 4 App. Div. 298.

[35](1876) 64 N. Y. 357.

[36](N. Y. 1843) 5 Hill 107; (N. Y. 1842) 4 Hill 351; (N. Y. 1821) 19 Johns. 59.

would be different. The principal could neither sue nor be sued. The absurdity of this is apparent upon the face of the statement, and the danger and pitfall of such a doctrine in business transactions is realized when we pause to consider how many printed forms of agreements have the letters "L. S." stamped upon them, or how easy it is to make the scroll. The numerous instances where the courts have been appealed to for the modification of this rule evidence not only its deep intrenchment in the law but also the restiveness of the Bar in submitting without protest to its application to the facts in hand.[37]

And yet in spite of the rigidity of this rule there are certain exceptions to it. One is that it does not apply to ante-nuptial agreements.[38] It was also held inapplicable in *Beardsley* v. *Duntley*,[39] a case of fraud, where a wife not a party to her husband's contract, which he made as her agent, recovered a certain farm not included in the sealed instrument. But even fraud, it was said later, in *Denike* v. *De Graaf*,[40] would not enable a principal who had not signed a sealed contract for exchange of lands to recover damages for deceit and false representations in procuring its execution.

It was suggested in the Briggs case that where the principal could not be held upon the contract, because it was sealed and had not been signed by him, that under certain conditions he might be held in assumpsit, that is, in an action upon a simple contract. These conditions were stated to be that the principal's interest must appear upon the face of the contract, that he must have received benefit under it, and have ratified and confirmed it by his acts. If all these three elements were present, then the principal might be held; but if only one of them appeared, as, for instance,

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[37]The following cases may be read with much profit as illustrating the tenacity with which we sometimes adhere to a rule when every reason for it is gone and every reason against it is present: Schaefer *v.* Henkel (1878) 75 N. Y. 378; Whitford *v.* Laidler (1883) 94 N. Y. 145; Henricus *v.* Englert (1893) 137 N. Y. 488; Spencer *v.* Huntington (N. Y. 1903) 100 App. Div. 463, (1905) 183 N. Y. 506; Williams *v.* Magee (N. Y. 1902) 76 App. Div. 512; Van Allen *v.* Peabody (N. Y. 1906) 112 App. Div. 57; Stanton *v.* Granger (N. Y. 1908) 125 App. Div. 174,—especially the dissenting opinion; Klein *v.* Mechanics' & Traders' Bank (N. Y. 1911) 145 App. Div. 615.

[38]Case *v.* Case (1911) 203 N. Y. 263.

[39](1877) 69 N. Y. 577.

[40](N. Y. 1895) 87 Hun 61, affd. 152 N. Y. 650.

that he had received all the benefit of the contract and still held it, there would be no method known to the law to reach him.[41]

Surely the time has arrived for the State of New York to have some scientific arrangement of the law regarding sealed instruments. The twenty years statute of limitations, and the liability of principal or agent, should not depend entirely on the presence or absence of a seal. Rather, we should follow the doctrine as it has developed regarding escrow and classify instruments according to their nature and importance. The courts, even with the power, when they feel so inclined, to relax rules of the common law or to reverse former decisions,[42] cannot be looked to for relief in this matter, as departure from the common law creates exceptions, and exceptions breed confusion. Over one hundred years ago the following words were penned by an eminent jurist of Pennsylvania:[43]

"The word seal has crept into the acts of the legislature in many cases without meaning or use. It was introduced as a term of course, or supposed to have some magic in it, which baffled the examination. Might it not be advisable by an act of the legislature to reduce the necessity of sealing to *corporate bodies*, who have seals, or are supposed to have them. It is the *hand writing* of an individual that must be proved, and not his seal; and why then continue the necessity of adding something that bears the name? The mischief is, that individuals do not always know where to use seals, or where they may do more harm than good."

Many states have abolished the use of the private seal such as, Arkansas, Indiana, Kentucky, Minnesota, Nebraska, Ohio, Rhode Island, Utah and Washington.

Would it not be wise and in the interests of a scientific and uniform administration of the law for the State of New York also to do away with the use of private seals and abolish the distinctions between sealed and unsealed instruments?

FREDERICK E. CRANE.

NEW YORK SUPREME COURT.

[41]See Klein *v.* Mechanics' & Traders' Bank (N. Y. 1911) 145 App. Div. 615.

[42]See Fitzwater *v.* Warren (1912) 206 N. Y. 355.

[43]Cooper *v.* Rankin (Pa. 1813) 5 Bin. 613-616.

THE POWERS OF COURTS OF EQUITY.

I. "In Rem" and "In Personam."

"A decree is not like a judgment in the King's Bench or Common Bench, for such a judgment binds the right of the party; but a decree does not bind the right, but only the person to obedience, so that if the party will not obey, then the Chancellor may commit him to prison until he will obey, and this is all that the Chancellor can do."[1] "The Courts of Equity in England are, and always have been, Courts of conscience, operating *in personam* and not *in rem*."[2] Over and over again are we confronted with these and similar statements. Judges and text-writers alike not only repeat these statements but give them as reasons for reaching decisions in cases. "Because," they say, "equity acts *in personam* it can do" one thing; "because it acts only *in personam*, it can not do" another thing. An example of the first line of argument is found in the case of *Toller* v. *Carteret*,[3] in which the foreclosure of an equity of redemption to land in another jurisdiction was asked. To the defendant's objection that the court had no jurisdiction, Lord Cowper, K., said the court of Chancery had jurisdiction since "the defendant was served with process here, *et aequitas agit in personam*, which is an answer to the objection." The decision in the case of *Ewing* v. *Orr Ewing*,[4] already cited, was based upon the same kind of reasoning. The second line of argument is illustrated by the following passage from the opinion of the Supreme Court of the United States in *Hart* v. *Sansom*[5]:

"Generally, if not universally, equity jurisdiction is exercised *in personam*, and not *in rem*, and depends upon the control of the court over the parties, by reason of their presence or residence, and not upon the place where the land lies in regard to which relief is sought. Upon a bill for the removal of a cloud upon title, as upon a bill for the specific performance of an agreement to convey, the decree, unless otherwise expressly provided by statute, is clearly not a judgment *in rem*, establishing a title in land, but operates *in personam* only, by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be cancelled, or to execute a release to the plaintiff."

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[1] Knightly, Serjeant at law, in Y. B. 27 Hen. VIII, f. 15, pl. 6, quoted in Ames, Cases in Equity Jurisdiction, p. 2. Compare J. R. *v.* M. P., (1459) Jenk. Cent. Cas. 108, pl. 9: "A decree there binds the person to obedience, but does not at all operate upon the matter in question."

[2] Lord Selborne, in Ewing *v.* Orr Ewing (1883) 9 App. Cas. 34, 40.

[3] (1705) 2 Vern. Ch. 494.

[4] (1883) 9 App. Cas. 34.

[5] (1884) 110 U. S. 151, 154.

The following typical extracts also show the important part played by this "maxim of equity" in the discussion of equity jurisdiction by text writers.

"The fundamental difference between law and equity [is], namely, that the law acts *in rem,* while equity acts *in personam.*"[6]

"Why is it, then, that equity admits as an absolute limitation upon its jurisdiction a principle or rule which it yet seems always to be struggling against, namely, that equity acts only against the person. . . . Another reason is that if equitable rights were rights *in rem,* they would follow the *res* into the hands of a purchaser for value and without notice."[7]

"Some writers even in theoretical discussion have allowed themselves to speak of the destinatory as 'the real owner,' and of the trustee's ownership as 'nominal' and 'fictitious.' See Salmond, Jurisprudence, p. 278. But I think it is better and safer to say with a great American teacher that 'Equity could not create rights *in rem* if it would, and would not if it could.' See Langdell, Harvard Law Review, vol. 1, p. 60."[8]

"A court of equity, since it proceeds only *in personam,* must have personal jurisdiction."[9]

"This interpretation of *Aequitas agit in personam* materially crippled, and permanently weakened, the judicial power of the chancellor, in that it rendered him unable to act on 'constructive service,' even though the *res* in controversy were within his jurisdiction. He had to have a party actually present before him, physically and intellectually capable of performing the order the chancellor might lay upon him. The chancellor could not say, as the admiralty judge could say: 'The whole world . . . are parties in an admiralty cause: and, therefore, the whole world is bound by the decision.' . . . The most important consequence, for present purposes, of this English judicial rendering of the Latin formula, *Aequitas agit in personam,* was this: Whenever the chancellor created and enforced a new right, *i. e.,* 'an equity,' not recognized or enforced by the common-law courts, the right had to be a right *in personam,* that is to say, a right in favor of one certain person, with its correlative duty or obligation imposed upon some other certain person."[10]

In view of the important consequences supposed by these and other writers and judges to flow from this "fundamental principle of" or "fundamental limitation upon" equity, it might be supposed that long ago the terms thus used so freely would have been sub-

[6]James Barr Ames, "Law and Morals," in Lectures on Legal History, 444. See also his remarks on page 76 of the same work.

[7]Langdell, Brief Survey of Equity Jurisdiction, 6.

[8]3 Maitland, Collected Papers, 350, note 1.

[9]Beale, Summary of Conflict of Laws, in Cases on Conflict of Laws, vol. III, 512.

[10]Professor Henry Schofield, 5 Ill. Law Rev., 19, 20.

jected to rigorous analysis and definition, but this does not seem to be the case. Apparently it is usually assumed that the terms are almost self-explanatory, or at least that they have a well-recognized meaning understood by all and so require only the briefest of explanations. Even a superficial examination of the books upon equity, however, will show not only that different writers give them different meanings, but that the same writer, sometimes within the limits of a single paragraph or even sentence, uses them first in one sense and then in another. That most of the disputes of this world turn on the meaning of words, is a saying credited to Cardinal Newman. It is therefore proposed in the present discussion to re-examine the subject anew, beginning with the definition of the terms used, in the belief that by so doing much light can be thrown upon the actual solution of problems which arise in courts of equity. As indicated by the passages quoted, the subject is of more than theoretical importance, in view of the use made of the "maxim" by judges in the actual decision of cases.

At the outset of our discussion we are confronted by the striking fact that these phrases—*in rem* and *in personam*—are used in the classification of several very different things. There seem to be at least four different uses which need to be distinguished: 1. These phrases are used in the classification of the so-called "primary" rights which legal and equitable actions are supposed to protect and enforce. The classification here is, of course, the well-known one of "rights *in rem*" and "rights *in personam*." 2. The next use has to do with the equally well-known classification of actions as "actions *in rem*" and "actions *in personam*." 3. A third use is in the classification of judgments and decrees as "*in rem*" or "*in personam*." 4. The fourth use refers to the procedure used by a court in the enforcement of its judgment or decree. Here the court is said to "act *in rem*" or "act *in personam*," as the case may be, the usual statement being that law does the former and equity the latter. A re-reading of the passages quoted at the opening of this discussion will show that many of the writers fail to differentiate clearly these different uses of these phrases, apparently assuming, for example that if a court acts "*in personam*," it must be enforcing a right "*in personam*." It seems necessary, therefore, if we are to make any progress in the solution of our problem, to discuss in order all four of these classifications, in order to see in what way they are related to each other.

Rights.

The most common classification of rights is that into rights *in rem* and rights *in personam.* Before we examine this classification we must notice that the word "right" itself is one of the most abused words in the legal vocabulary, being applied to a number of widely differing jural relations. This has been so recently and so exhaustively discussed by Professor Hohfeld in his valuable article upon Fundamental Legal Conceptions,[11] as well as earlier by Terry,[12] that no exhaustive treatment will be undertaken here. It will be sufficient for our present purposes to enumerate briefly the different meanings attached to the word and to indicate in which sense it is used in this discussion.

In the strict and proper sense of the word, "right" is used as the correlative of "duty," *i. e.* when we say that A has a certain right against B, we mean at the same time that the law regards B as under a correlative duty. For example, if A has a right that B shall not assault him, B, we say, is under a correlative duty to A not to assault him. Both statements mean, of course, in the last analysis that if B does (or in other cases fails to do) a certain act or certain acts, A can bring an action in the appropriate tribunal and obtain some kind of a judgment or decree against B.[13]

It would no doubt be extremely desirable if we could restrict the word right to this one sense, but usage is against us. We find ourselves talking of the right of self-defence, the right to use one's land or other property, etc. If we stop to analyze, we find that what is dominant in our minds is, that it is no wrong for one to defend himself, or to use his property in a particular manner. We are not looking at B's duties to A, but at the fact that A owes no duty to B. In the case of self-defence, A, who ordinarily owes B a duty to refrain from striking him, is under no duty, so long as he keeps within certain limits, to refrain from doing so. In the case of the so-called "right to use" property, it is part of A's ownership that he is under no duty to refrain from doing an indefinite number of things on the land. This kind of a right, it has been suggested, may be called a "permissive

[11] 23 Yale Law Journal, 16.

[12] H. T. Terry, Leading Principles of Anglo-American Law, §§113-129.

[13] Bingham, The Nature of Legal Rights and Duties, 12 Michigan Law Rev. 1. Of course if we wish to make our statement strictly accurate, we must note that mere threats to do acts, which if done would give rise to a cause of action, often give rise to an equitable cause of action for an injunction. But to make a threat is to do an act, so after all our statement is not incorrect.

right,"[14] or "privilege."[15] In what follows, the word "privilege" will be used to signify this kind of a "right." The correlative of "privilege" is of course "no-right,"[16] *i. e.* when B has "no-right" to have A refrain from an act, A has the "privilege" of doing that act.

Still other uses of the word "right" are to be found. It is sometimes said that one bound by a contractual obligation has, at least at law, a "right" to break it and pay damages.[17] If one bears in mind the meaning of "right" in the strict sense, as we have defined it above, this statement is obviously untrue. It is, however, true that usually (at least at common law) he has the power to break it, and he thereby becomes liable for damages for doing so.[18] In the case of so-called complete breach, the effect is to end the contractual obligation as such, and to substitute the "right of action" for damages. So when we speak of a "right" to a mechanic's lien, we are not using it in either of the first two meanings; there may be no personal duty on the owner of the land at all and we do not have in mind the idea of "privilege." What is meant is that the holder of the lien can, through the court, exert a "power" over the owner's interest in the land. The correlative of "power" may, following Professor Hohfeld's suggestion, be called "liability."

Confining our attention for the present to rights in the strict sense—for it is obviously these that Austin and others are classifying—let us examine the usual classification more closely. Austin's definitions are as follows:

"Rights *in rem* may be defined in the following manner: 'Rights residing in persons and availing against other persons *generally*.' . . . The following definitions will apply to personal rights (*i. e.* rights *in personam*): 'Rights residing in persons and answering to duties which are incumbent exclusively on persons specifically determinate.' "[19]

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[14]Terry, Leading Principles of Anglo-American Law, §§ 113-129.

[15]Hohfeld, 23 Yale Law Journal, 32.

[16]Hohfeld, 23 Yale Law Journal, 32.

[17]O. W. Holmes, The Common Law, 301.

[18]In the case of an offer coupled with a promise to keep the offer open for a certain time, if this promise is either under seal or given for a consideration, it seems to be the prevailing view that the offer is irrevocable. O'Brien *v.* Boland (1896) 166 Mass. 481; McGovney, "Irrevocable Offers," 27 Harvard Law Rev. 644. If this be true, the contract to keep the offer open can not be broken so as to destroy the offer. Quite possibly an action could be brought because of the ineffectual attempt to revoke, on the analogy of anticipatory breach.

[19]Austin, Jurisprudence (5th ed.) 370.

Holland's definitions are:—

"A right is available either against a definite person or persons, or against all persons indefinitely. A servant, for instance, has a right to his wages for the work he has done, available against a definite individual, his master; while the owner of a garden, has a right to its exclusive enjoyment available against no one individual more than another, but against everybody.

"This distinction between rights has been expressed by calling a right of the definite kind a right *in personam,* of the indefinite kind a right *in rem.* And these terms, though not perfectly satisfactory, have obtained a currency which is of itself a recommendation, and moreover are perhaps as good as any substitutes which could be suggested for them. The former term indicates with tolerable perspicuity a right available *'in personam (certam)'*, against a definite individual, while the latter implies that the right is capable of exercise over its object, *'in rem,'* without reference to anyone person more than another. . . . If the terms *'in rem'* and *'in personam'* were to be discarded, we should prefer to speak of 'rights of determinate,' and 'rights of indeterminate incidence.' "[20]

It will be seen that these definitions do not in essence differ, and they seem to be the ones usually adopted.[21] It should be carefully noted in passing that according to these definitions a right would not cease to be a right *in rem* and become a right *in personam* merely because it was not available against every person in the jurisdiction. According to the common law, a person who is peaceably in possession of a chattel is, even though he be a wrong-doer, owner as against every stranger, although of course he is not the owner as against the one from whom he is wrongfully detaining the article.[22] We cannot, of course, describe his right against all the persons within the jurisdiction except the true owner as a right *in personam,* and it certainly does seem to answer to the definitions of a right *in rem* as given above. Holland does in one place say "everybody," but it seems to be an inadvertence on his part. In other words, so long as the right is available against an indeterminate number of persons, even though not against all in the jurisdiction, it is a right *in rem* within the

[20]Holland, Jurisprudence (10th ed.) 139-141.

[21]Markby, Elements of Law, § 164; Pollock, First Book of Jurisprudence, 81; Salmond, Jurisprudence (2d ed.) § 81; Terry, Anglo-American Law, §§ 129-130. It may very likely turn out, on analysis, that "right *in rem*" is only a shorthand expression for a congeries of actual and potential rights *in personam.* See Terry, *loc. cit.;* Bingham, 9 Columbia Law Rev. 17.

[22]Jeffries *v.* Great Western Ry. (1856) 5 E. & B. 802; "The Winkfield" [1902] P. 42; Ames, Lectures on Legal History, 190.

usual meaning of that phrase. This is often overlooked[23] and we shall have occasion to recur to this later in discussing the oft-quoted statement of Langdell that "if equitable rights were rights *in rem,* they would follow the *res* into the hands of a purchaser for value and without notice."[24]

It is obvious, as previously stated, that these definitions, since they presuppose duties as correlative to rights, do not apply to "privileges" or "powers."

Before leaving this part of our subject, it is worthy of notice that the late Professor Ames, at least at times, used the phrase "right *in rem*" in what seems to be a totally different sense. In his essay on "The Disseisin of Chattels"[25] and in other essays[26] he seems to mean by right *in rem* the right to recover a physical object or *res* from those into whose hands it may come, whoever they may be. Speaking of the rights of a dispossessed owner of a chattel, he says: "His right *in rem,* if analyzed, means a right to recover possession by recaption or action. But these rights are as personal in their nature as the corresponding rights of entry or action in the case of land. It follows then that they were not transferable and such was the law."[27] His right *in rem,* at least as applied to chattels, seems to be a mere chose in action, inalienable at common law.[28] It need hardly be said that this is not the sense in which "right *in rem*" is used above, and it is believed it is not a common one. It must of course be reckoned with in discussing

[23]Hart, "The Place of Trust in Jurisprudence," 28 L. Q. R. 296. Even if we should deny the name "right *in rem*" to rights available against an indefinite number of persons, but not available against "everybody," it would not follow that they were "rights *in personam*," as Mr. Hart concludes. They would still not be rights available against definite persons. They would be neither *in rem* nor *in personam.* It seems more convenient to classify them as *in rem.*

[24]Langdell, 1 Harvard Law Rev. 60; Brief Survey of Equity Jurisdiction, 6.

[25]3 Harvard Law Rev. 23; Lectures on Legal History, 272.

[26]See the lecture on "Detinue" in Lectures on Legal History, 77.

[27]Lectures on Legal History, 184-185.
Apparently, according to Professor Ames's conception, a complete right *in rem* includes the ability to recover the physical *res* from any one into whose hands it comes. Anything short of this is only a "qualified right *in rem*," (Lectures on Legal History, 184), or else only a right *in personam* (*Idem,* 74-75).

[28]The flaw in the distinguished writer's logic, if there be one, seems to lie in overlooking the fact that, in modern law, after the disseisin the dispossessed owner has a true right *in rem,* available against people generally, that they shall refrain from dealing with the chattel in certain ways, giving rise to actions of trover or case, according to the circumstances. Such a right is of course transferable.

any statements Mr. Ames may make concerning the nature of equitable rights.

Professor Ames's use of the term suggests another point which deserves emphasis. It might be inferred from his argument,—though he does not draw the inference and probably would not have done so had his attention been called to it—that the owner of a chattel in early English law did not have a right *in rem*. At the time when replevin would not lie for trespassory takings, and detinue was still a purely contractual action, the disseisee of a chattel, if he did not recapture it on fresh pursuit, lost all interest in it[29] If right *in rem* means merely the right to recover possession from every one into whose hands it may come, the disseisee had no right *in rem,* either before or after the disseisin. But if *in rem* means a "right of indeterminate incidence," the right of the owner of the chattel before the disseisin occurs was clearly a right *in rem,* for he could bring an action for damages against any one who wrongfully interfered with his possession of the chattel. People generally were under duties not to disturb his possession of the chattel except for some lawful purpose, and the fact that, by committing a breach of duty, some one of them could put an end to the right did not prevent this right against people generally from being a right *in rem* so long as it lasted. It could of course be violated without its being lost, as where some one injured the chattel without depriving the owner of his possession. The real difference between the ancient law and the modern law is that the owner's right *in rem* is less easily destroyed now than then, and so is more valuable: in both it is a right *in rem*.

Actions and Judgments.

Actions are also commonly classified as *in rem* and *in personam*.[30] Before we discuss the significance of these terms as applied to actions, it may perhaps be well to examine briefly the nature of what writers on jurisprudence have called "remedial rights." Wherever a right, in the strict sense of that term, is invaded, there arises, these writers tell us, a 'remedial right."[31] Indeed, the so-called "right" violated is such only because of the fact that it is vindicated or sanctioned in this way. A remedial right which arises because a primary right has been violated (or,

[29]Ames, Lectures on Legal History, 178.

[30]Langdell, 1 Harvard Law Rev. 119; Brief Survey of Equity Jurisdiction, 27.

[31]Holland, Jurisprudence (10th ed.) Chap. XIII.

in some cases in equity, because there is a threat of violation), is necessarily always available against a particular person or number of definite persons. If the classification of rights into rights *in rem* and rights *in personam* has any application to remedial rights, they are obviously rights *in personam*. If however we examine these remedial rights more carefully, we may perhaps conclude, at least where the remedial right is to damages at common law (though perhaps not in all other cases), that they are not rights at all in the strict sense of the term. Indeed it seems difficult to maintain for a moment that there is any "right" to damages in the strict sense of right, *i. e.* with a corresponding duty to pay the damages. If there were, it would be violated by non-payment of damages and a new remedial right would arise to be again violated by non-payment, and so on, *ad infinitum*. The "right to damages" on analysis, appears to consist of (1) a privilege,[32] and (2) a power with the corresponding liability. There is a liability on the part of the defendant to have a judgment entered against him, but no duty to pay until the judgment is entered.[33] The plaintiff through the court has a power to subject the defendant to the imposition of a new obligation known as a debt of record, which is of course a new primary right with its corresponding duty.[34] This power, of course, is always over a definite person or number of definite persons and may be called a "power *in personam*."

It may now be noted that, so far as the character of this "remedial right" is concerned, it is not material whether the primary right violated be a right *in rem* or a right *in personam;* what results is a remedial right against, or, as I prefer to put it, a "power *in personam*" over, a definite person or number of persons. Whether the cause of action upon which a plaintiff relies be for breach of simple contract or for a tort of any kind, the offending party is subject to the same kind of personal liability, *viz.*, to have

[32]That is, plaintiff is under no duty to refrain from setting the machinery of the court in motion. Terry, Anglo-American Law, §§ 142-144.

[33]Terry, *loc. cit.* If there were a duty to pay unliquidated damages, it would seem that a tender of an amount, later found to be ample, would, while not extinguishing the cause of action, deprive plaintiff of costs. This was not the law. Tender of any amount by way of unliquidated damages had apparently no legal effects at common law. Cilley *v.* Hawkins (1868) 48 Ill. 308.

[34]Of course it must not be overlooked that though the defendant is under no duty to pay damages, the court is under a duty to give the plaintiff his judgment if he adopts the correct procedure. From this point of view, the plaintiff's cause of action includes a true right, but not as against the defendant. This right, of course, is enforced not by an action for damages, but by appellate or other appropriate proceedings (mandamus, etc.).

a judgment for damages entered against him, with all its attendant consequences.[35] We may therefore say that the principal object of every action for damages in a common law court is to enforce such a "power *in personam*" over, or such a personal liability of, the defendant. This is expressed by saying that the action is a personal action or action *in personam*.

This discussion gives us the clue to our classification of actions. The action *in personam* is so classified because the principal object of the action is to enforce a personal liability, and the resulting judgment is usually called a personal judgment or judgment *in personam*. If, then, we are to classify actions according to the object sought to be accomplished by them, we must now ask ourselves, what other object can an action have? Perhaps this question is best answered by the consideration of some concrete cases. Let us therefore examine a common law writ of partition, or its modern successor, the statutory action of partition which exists in many States. What is the object of such an action? This, of course, is best answered by noting what plaintiff asks for and receives. We may for our present purposes confine ourselves to the common law writ. Professor Langdell thus describes its operation:

"When common-law courts were in the habit of entertaining suits for the partition of land, the partition was made by the court itself without any act of the owners of the property whatever. The court first rendered judgment that partition be made (*quod partitio fiat*); whereupon a writ was issued to the sheriff, directing him to make a partition of the land pursuant to the judgment, and report the same to the court. When this had been done, the court rendered another and final judgment that the partition so made remain firm and stable forever (*firma et stabilis in perpetuum teneatur*); and by force of this latter judgment each party acquired the exclusive title to the share allotted to himself, and ceased to have any title to the shares allotted to the others."[36]

If we examine this proceeding, we find that it differs from a common law action for damages in a very striking way. The plaintiff does not claim that defendant has violated any right in the strict sense, which plaintiff had against him, *i. e.*, he does not claim that defendant has been guilty of any breach of duty. He

[35]Even if a judgment did not create a new primary right (debt of record), it would give the plaintiff the right to execution against either the person or the *general assets* of the defendant; and this is what we have in mind when we call the liability and the judgment *in personam* or personal.

[36]Langdell, Summary of Equity Pleading (2d ed.) 36, note.

does not seek therefore to enforce any personal liability of defendant's. He does not, in other words, seek to enforce a "power *in personam*" against defendant. He does ask to have the interest which the defendant has in a particular piece of property altered. In other words, he seeks to get at a particular *chose* or *res* that defendant has and to deprive defendant of it. Since the enforcement of a power (of course exercisable only through the court) over a specific *res* is the object of the action, the action may appropriately be called an action *in rem;* and this use of the phrase is often found.

We may say very properly that plaintiff has a "power *in rem*," *i. e.* a power over a particular *chose* or *res* which defendant has. This power can be exercised only through the court, so we have a resulting "action *in rem.*" It must of course be noted that now *in rem* has a very different meaning from what it has as applied to rights. "Right *in rem*" means "right available against people generally"; "power *in rem*" means power over a particular *res* which the defendant has.

It must also be noted that a power *in rem* is usually, though not always, exerted against a definite person or number of persons, and so an action *in rem* (as here defined) usually has as defendants a definite person or number of persons, and they alone are bound by the judgment and proceedings under it. They are deprived of their specific property interests, which it was the principal object of the action to get at; persons not parties to the proceeding are not deprived of their interests in the same physical *res.* However, an action *in rem* may (as in the admiralty cases) bar "the whole world," but this is not an essential feature of actions *in rem* as here defined. Some writers apparently apply the name "action *in rem*" only to those in which the interests of "the whole world" in the *res* are adjudicated. For our purposes, this restriction does not seem to be a useful one.[37]

[37]It is probably true that the admiralty use of the term, denying that any action is *in rem* unless the "whole world" are barred by the judgment from afterwards claiming any interest in the *res*, is the more common. See, for example, 3 Beale, Cases on the Conflict of Laws, 538. If we limit the term in this way, we have no adequate name by which to describe those actions which we have called *in rem*, but which affect only the interests of the particular defendants. They are not actions *in personam*, for they enforce no personal liability of the defendant. Apparently Professor Beale would call them actions *"quasi-in-rem."* (Cases on Conflict of Laws, vol. III, 513). The common usage has the advantage (if it be one) that it makes the use of *in rem* here comparable to that in the classification of rights. However, what we shall call a thing is not so important as to know what we do mean when we use a phrase, and the particular terminology used in this article is not insisted upon

It is of course common to speak of a "right to have partition made." It is now clear, however, that this "right" upon analysis turns out not to be a true right, but a privilege and a power,[38] and, unlike the remedial right which arises upon the violation of a primary right, we do not think of it as based upon any wrong committed by the defendant. There is therefore no "power *in personam*" with its correlative personal liability.

Other examples of actions of this kind—many of them statutory—readily suggest themselves: proceedings for the condemnation of property under the power of eminent domain; proceedings to enforce special tax assessments upon real property, and usually also for the enforcement of the general tax upon real property; proceedings to enforce mechanics' and other similar liens; proceedings to foreclose mortgages in "lien theory" States, etc., etc. It must be noted that often a plaintiff has his choice between enforcing a remedial right (power) *in personam* by an action *in personam;* and enforcing a right (power) *in rem* by an action *in rem.* Instead of foreclosing a mortgage and getting his money by exercising his power over the land, he may of course enforce the personal liability of the mortgagor on the debt. These two things must, of course, be kept distinct.[39] In a modern mortgage foreclosure proceeding with its sale of the land and deficiency decree we find the two things combined: the foreclosure by sale, an action *in rem,* is combined with the deficiency decree, an action *in personam.* This becomes obvious the moment we consider the case of a foreclosure against a purchaser of the "equity of redemption" who takes subject to the mortgage but does not assume the payment of the debt. No deficiency decree can be entered against him, for, as we say, "he is not personally liable." The

except as being useful for the end we have in view—the discussion of the powers of courts of equity. The distinction between an action which seeks to charge the defendant personally and one which seeks merely to deprive him of a specific *res,* is for our purposes the fundamental one, and our classification is therefore based upon it.

It must be carefully noted that our classification is based upon the principal object sought to be accomplished by the action. It may well be that an action *in personam* has some incidental effects *in rem;* and vice versa. This is left for discussion later.

[38]That is, there is no duty to refrain from bringing the action, and by bringing it the plaintiff can (through the court) exercise a power over a particular *res* belonging to the defendant.

[39]This distinction appears clearly in the admiralty cases in the difference between the libel *in rem* and the libel *in personam.* The "right" to one may exist without the "right" to the other. Thompson Navigation Co. *v.* Chicago (1897) 79 Fed. 984; Workman *v.* New York City (1900) 179 U. S. 552.

sole "right," so far as he is concerned, is really a power over his interest in that particular piece of property.[40]

Returning for a moment to our partition at common law: As we have seen, the object of the action is to deprive the defendant of an interest in a particular *res*. We must now note that the judgment, irrespective of what is done under it, accomplishes this directly, *i. e.* the common law court has the power to produce directly the desired result. The judgment is therefore said to be *in rem,* meaning that a specific interest in property is being transferred or extinguished. The use here is to be compared, of course, with the use of the phrase in classifying actions and not with its use in classifying rights. It is to be noted that in very few common law actions does the judgment have this effect.

Our classification of actions, then, turns upon their principal object—the assertion against the defendant of a power *in personam* or of a power *in rem;* of a general personal liability or of a liability to lose a particular *res*. If the principal object of the action is the former, we call the action *in rem;* if the latter, it is *in personam*. It is interesting to note the application of this classification to cases of "service by publication." It is common today to provide for "constructive service" by publication of non-resident defendants who are not personally in the jurisdiction. This is held to be permissible when the action is *in rem,* in the sense in which we have here defined it, the judgment or the proceedings under it being also *in rem*. It is also held permissible when the action is normally one *in personam,* providing some property interest of the defendant is regarded as having a situs within the jurisdiction and proper steps are taken to attach this interest. If we examine the cases dealing with this question carefully, we shall, it is believed, find that all that is permitted is really an action *in rem* as here defined. The legislature has, by this legislation, in effect authorized the substitution of an action *in rem* (in our sense of those words) in place of the normal action *in personam*. That this is the correct statement of the result seems clear when we recall that no personal judgment can be entered against the non-resident defendant served only by publication, the only "right" being to deprive him of the particular interest in property which has been duly attached.[41]

[40]The original strict foreclosure is not here in view. That will be discussed later.

[41]Pennoyer *v.* Neff (1877) 95 U. S. 714; Woodruff *v.* Taylor (1847) 20 Vt. 65; 3 Beale, Cases on Conflict of Laws, 513. Of course if the non-resident defendant appears generally in the action and thus submits

In the typical common law action *in rem*, the writ of partition, the judgment, we saw above, carries out the object of the action directly, *i. e.* the effect of the judgment is to alter the property interest of the defendant in the desired manner. The judgment is then said very properly to be itself *in rem*.[42] In other actions *in rem* this result is accomplished only by what is done under the judgment by officers of the court, as in the case of the foreclosure of a mortgage by sale, or the sale of land for taxes. Sooner or later, however, entirely without the coöperation of the defendant, the desired alteration in his property interest takes place because of the judicial proceedings. Suppose now the principal object of the action remains the same, but the court can bring about the desired result only by ordering the defendant to execute a deed or some other instrument: will the action be converted into one *in personam?* Would a proceeding for the condemnation of land under the power of eminent domain become an action *in personam* if the statutes provided that title should pass to the State only when defendant, under order of the court, executed a deed to the State? In other words: Is it a requirement of an action *in rem* that the judgment or the proceedings under it have a direct action *in rem?* Does an action cease to be *in rem* if, while its principal object remains the same, *viz.*, to deprive the defendant of a particular *res*, a decree must be made, ordering the defendant personally to do an act in order that the object be accomplished? The answer to this question can perhaps best be given later in connection with our main discussion of the powers of courts of equity.[43]

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to the jurisdiction of the court, personal judgment may be entered. The effect is to restore to the action its original character as *in personam*. It may at the same time, however, retain its aspect as an action *in rem*. If the non-resident defendant wishes, he may in most jurisdictions, though not in all, appear specially for the purpose of disputing the validity of the attachment proceedings, in which case the action continues as one purely *in rem*.

[42]Here also usage differs; often the term is limited to judgments which bar "all the world." 3 Beale, Cases on Conflict of Laws, 538. This of course denies that a judgment, the effect of which is merely to pass title to *defendant's* interest in a *res*, is *in rem*. If we say this, then to be consistent we must say that the law does not act *in rem* in the case of a sale on execution. See *infra*, under *"Procedure."*

[43]The Roman law use of *actio in rem* and *actio in personam* must be carefully distinguished both from the classification here adopted and from that of those whose use of the terms has been indicated above in note 37. "The terms *jus in rem* and *jus in personam* are derived from the Roman terms *actio in rem* and *actio in personam*. An *actio in rem* was an action for the recovery of *dominium;* one in which the plaintiff claimed that a certain thing belonged to him and ought to be restored or given up to him. An action *in personam* was one for the enforcement of

Procedure In Personam and In Rem.

We now come to that use of the phrases *in rem* and *in personam* most commonly in the minds of writers who are comparing law and equity. When it is said that the law acts *in rem* while equity acts only *in personam,* it seems that what is in the mind of the person making the statement is the difference between the methods used by the law courts and by the courts of equity in enforcing their judgments and decrees respectively.

If a judgment *in personam* is entered at law for damages for a tort or breach of contract, the most usual method of enforcing the judgment, if it be not paid, is to issue execution against the defendant's property, and enough is sold to satisfy the plaintiff's claim. By virtue of such a proceeding the title to the property thus sold passes to the execution purchaser, and the defendant is deprived of his interest in it. Consistently with our use of the phrase in classifying actions, we may call this "procedure *in rem.*" The action and judgment however, are *in personam,* since the object of the action was, not to get at any specific *res* which defendant owned, but merely to enforce a personal liability, and so to obtain a personal judgment. Having pointed out this method of enforcing common law judgments, our writers now proceed to explain action *in personam* by discussing a bill for specific performance brought by vendee against vendor, in the case of a contract for sale of land. They point out that the chancellor, having ordered the defendant to convey to the plaintiff the title to the land in question, proceeds to punish him for contempt if he does not obey. Without a statute the chancellor cannot act *in rem* on the title so as to deprive defendant of it and vest it in the plaintiff. All this, of course, is elementary learning. Here, it is said, is the fundamental difference between law and equity.[44] In the making of this comparison, however, there is involved a confusion of thought. In speaking of the court of equity, reference is had both to the character of the decree and also to the method

an obligation; one in which the plaintiff claimed the payment of money, the performance of a contract, or the protection of some other personal right vested in him as against the defendant." (Salmond, Jurisprudence (2d ed.) 208). See also Gaius, IV, 2; Sohm, Institutes, Ledlie's trans., 185. It is worthy of note in this connection that Langdell seems to use the terms, in part at least, in the Roman Law sense. (Brief Survey of Equity Jurisdiction, 27). This makes replevin and detinue actions *in rem.* Whether the definition here given covers these will be discussed later, in connection with our main discussion of the powers of courts of equity.

[44]Ames, Lectures on Legal History, 76.

of enforcing it. The decree is *in personam,* and the method of enforcing it is also *in personam.*[45] In the case of the judgment at law, the reference is entirely to the method of enforcing it, for obviously in the case put the judgment is purely *in personam.* Legal judgment and equitable decree are alike *in personam,* in the sense that neither has the direct effect, independently of what is done under it, of depriving defendant of an interest in a piece of property. There is a difference in form, to be sure, in that the law court adjudges that plaintiff recover a certain sum to which it regards him to be entitled, while the chancellor orders defendant to do his duty;[46] and this emphasis on duty rather than right has doubtless had its influence upon the character of equitable doctrines.[47] The real difference, however, if there be any, lies in the character of the means used to enforce the judgment and decree respectively. The law court, say these writers, in enforcing its judgment, proceeds or acts *in rem,* while the chancellor in enforcing his decree proceeds only *in personam.*

Whether this difference in many cases really exists and is so fundamental as is commonly supposed, we must leave for later discussion. That there is a difference between acting *in rem* and acting *in personam,* where the judgment or decree is *in personam,* is clear. To levy on a man's property, sell it, pass title to it to a purchaser, and pay the proceeds to the plaintiff who holds the judgment *in personam,* is very obviously to do a fundamentally different thing from ordering the defendant to do an act and putting him in jail for contempt if he does not obey; and the phrases *in rem* and *in personam* probably express this as well as any others. It should be noted, however, that the phrase *in personam* now acquires a shade of meaning somewhat different from any we have thus far given it. It now means merely that, as a punishment for not doing something and for the purpose of persuading him to do it, the court deals directly with the physical person of the defendant, as distinguished from dealing with his property.

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[45]Note that *in personam* is used in somewhat different ways here. This is discussed below.

[46]Ames, *loc. cit.* Does a court act *in rem* in an action of detinue? Professor Ames says so. If so, either *in rem* must mean, not passing title to property, but dealing with the physical object, or else the result of the proceedings in detinue is to pass title to the physical *res.* In either event, the truth of many of Mr. Ames's statements about equity are open to challenge. In Part II of this article this will be fully discussed.

[47]Ames, "Law and Morals," in Lectures on Legal History, 444.

We have now completed, so far as is necessary for our purposes, our classification of rights, of actions, of judgments and decrees, and of procedure to enforce judgments and decrees. It remains to apply this classification to equitable rights, actions, decrees and procedure. Before doing so, some interesting results of our analysis may be briefly pointed out.

1. Actions *in personam,* which, of course, result in judgments *in personam,* are used to enforce[48] rights *in rem* as well as rights *in personam.* In an action of trespass *quare clausum,* the primary right is *in rem,* but the action is obviously *in personam,* and so of course is the judgment. There is therefore no necessary connection between the character of the primary right and the character of the action and judgment which enforces it.[49]

2. Procedure *in personam* may be used to enforce either a right *in rem* or a right *in personam.* When for example, the chancellor commits B for contempt, he having violated an injunction restraining him from trespassing on A's land, the right thus enforced is, of course, A's right *in rem;* and the same is true wherever equity protects property rights. The procedure, however, is *in personam, i. e.* the chancellor will commit B for contempt if he violates the injunction.

3. Procedure *in rem* may be used to enforce either a right *in rem* or a right *in personam.* The common law procedure under a judgment for a trespass to land (violation of right *in rem*) and under one for breach of contract (violation of right *in personam*) is in both cases *in rem* if execution is had against defendant's property. There is therefore no necessary connection between the character of the primary right and that of the procedure to enforce the judgment which grew out of the violation of the right. A rereading of the passages quoted at the opening of this article will show a strange failure on the part of some of those quoted to observe these facts.

4. Either procedure *in personam* or procedure *in rem* may be used to enforce a judgment *in personam.* Such a judgment is based upon a personal liability, and is the result of an action *in personam.*

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[48]Enforce, of course, does not mean *specifically* enforce.

[49]This is due to the fact, previously suggested, that right *in rem* is a name for a large number of rights *in personam,* actual or potential. A violation of a right *in rem* is always a violation of a definite one of these rights *in personam.*

The procedure to enforce it may consist (as in common law execution) of "acting *in rem*" on defendant's property, or (as in attachment for contempt in equity) of "acting *in personam*" by imprisoning the defendant. In other words, we think of judgment or decree as *in personam* if under it we can either get at the defendant's person or at his general assets without regard to any specific piece of property. A judgment is *in rem* only when by virtue of it we get at a specific property interest which the defendant has.[50]

(TO BE CONCLUDED.)

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[50]To make our discussion complete, we must of course under our definition of *res* include matrimonial status. A divorce action is of course *in rem* in our sense of the phrase.

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NOTES.

COVENANTS RUNNING WITH THE LAND.—A covenant running with the land creates personal rights and obligations in those not parties to the contract, and it is, therefore, not surprising that the courts have differed in their interpretation of these agreements. It was resolved in *Spencer's Case*[1] that such covenants must touch and concern the land, but this statement of the law was too vague to lay down any final test, with the result that the courts, in explaining and qualifying this resolution, have enunciated numerous conflicting rules.[2] The modern conception of a covenant touching and concerning the land

[1](1583) 5 Co. 16a.

[2]See Bally *v.* Wells (1769) 3 Wilson 25; Vernon *v.* Smith (1821) 5 B. & Ald. 1; Norman *v.* Wells (N. Y. 1837) 17 Wend. 136; Keppel *v.* Bailey (1834) 2 M. & K. 517.

appears to be that it is one which affects the value of the land,[3] and it would follow that the covenant must affect the owner of the estate by virtue of his ownership.[4] In some jurisdictions, effects in their nature indirect sustain the running of a covenant, so that agreements increasing the profits of the land for collateral reasons have been held to touch and concern the land.[5] Nevertheless, the weight of authority requires that some direct advantage or disadvantage enure to the estate independent of collateral circumstances,[6] or that the influence of the covenant on the value of the estate be clearly evident from the face of the grant or demise.[7] The narrower limitation was applied in the recent case of *Consolidated Arizona Smelting Co.* v. *Hinchman* (C. C. A. 1914) 212 Fed. 803, in which a covenant to pay to the vendor of certain mining property, and his assigns, a given percentage of the net earnings of such property, up to a specified sum, was held to be merely personal.

It may, therefore, be stated that no covenant will run unless it touches and concerns the land in accordance with the test laid down in the particular jurisdiction, and that the stipulations of the parties to the covenant cannot cause the agreement to affect third parties if it does not in its nature touch and concern the land.[8] The fact that a covenant does touch and concern the land is not, however, the only factor in determining whether it will run with the land. Another feature is that there be some sort of privity, either of contract or of estate, between the parties to the suit.[9] Privity of estate originally denoted some form of tenure between the parties, and since the Statute *Quia Emptores* abolished subinfeudation, a grantee in fee bears no relation to the grantor of his grantor, so that privity in the orthodox sense would seem to be limited to the relation of landlord and tenant.[10] A covenant which touches and concerns the land may, by the rules of the common law as supplemented by the Statute of 32 Henry VIII,

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[3]Gilmer *v.* Mobile etc. Ry. (1885) 79 Ala. 569, affd. (1888) 85 Ala. 422; Norman *v.* Wells, *supra;* Shaber *v.* St. Paul Water Co. (1883) 30 Minn. 179. The act contemplated need not be performed upon the land itself, as long as it influences the value of the land. Norfleet *v.* Cromwell (1870) 70 N. C. 634; Vyvyan *v.* Arthur (1823) 1 B. & C. 410.

[4]Vyvyan *v.* Arthur, *supra;* Vernon *v.* Smith, *supra;* see National Union Bank at Dover *v.* Segur (1877) 39 N. J. L. 173.

[5]Vyvyan *v.* Arthur, *supra;* National Union Bank at Dover *v.* Segur, *supra.*

[6]Congleton *v.* Pattison (1808) 10 East 130; Wiggins Ferry Co. *v.* Ohio etc. Ry. (1879) 93 Ill. 83; Norcross *v.* James (1885) 140 Mass. 188; Brewer *v.* Marshall (1867) 18 N. J. Eq. 337. A covenant which relates only to the mode of occupying the land will not run with the land. Thomas *v.* Hayward (1869) L. R. 4 Ex. 311.

[7]*Cf.* Norman *v.* Wells, *supra,* p. 157.

[8]Gibson *v.* Holden (1885) 115 Ill. 199; Wilmurt *v.* McGrane (N. Y. 1897) 16 App. Div. 412. The parties may, however, contract that a covenant which would otherwise run with the land, shall not affect third parties. See Wilmurt *v.* McGrane, *supra;* Masury *v.* Southworth (1859) 9 Ohio St. 340.

[9]See Webb *v.* Russell (1789) 3 T. R. 393; 2 Bac. Abr. (Am. ed.) 572. There appears to be some confusion between the necessity of privity and the requirement that a covenant touch and concern the land. See Bally *v.* Wells, *supra,* which draws a clear distinction.

[10]See Keppel *v.* Bailey, *supra;* 11 Columbia Law Rev. 384.

c. 34,[11] run against the assignee of the lessee or the assignee of the reversion, or in favor of these parties,[12] since the lessee takes only a temporary possession of an estate which will ultimately revert to his lessor,[13] and the required privity of estate is, therefore, present.

A covenant running on a grant in fee must, however, be explained on other principles, except in the limited class of cases where the grantor reserves an interest which may create some fiction of tenure construed not to have been abolished by the Statute *Quia Emptores*.[14] Where the grantee takes an estate subject to the benefit of a covenant, an assignment of a chose in action may be implied in the transfer of the estate.[15] Since a chose in action is to-day everywhere assignable, there should accordingly be no difficulty in deciding that the benefit of a covenant may run with a grant in fee, and this is the general rule.[16] Since, however, there can be no assignment of an obligation in the absence of some facts tending to show a novation, a grantee should take the estate free of all covenants which put a burden upon the estate granted. This is the view now adopted in England, both at law[17] and in equity, since Chancery will not enforce an agreement against a party not privy thereto which does not amount to a covenant running with the land at law,[18] unless it comes within the peculiar equitable notion of a restrictive agreement as set forth in *Tulk* v. *Moxhay*.[19]

In this country, the doctrine that a burden would not run with the land at law was at first rigidly followed,[20] but certain jurisdictions have somewhat qualified the theory, while others have rejected it altogether. This may be said to have resulted from a change in the conception of the nature of privity of estate, a term which is no longer limited to tenurial relations, but has frequently been said to exist whenever the covenant so touches and concerns the land or estate of both parties, that there is a mutual or successive relationship as to the same rights of property.[21] Under this definition the covenant cannot be separately created, but must always accompany a grant or transfer of the interest to which it is appurtenant,[22] since the estate itself is

[11]This statute gave a cause of action to the reversioner, and has been re-enacted in most of our States. See Sims, Real Covenants, 73 *et seq.* For the common law, see 2 Gray, Cases on Property (2nd ed.) 318.

[12]Vernon *v.* Smith, *supra;* Norman *v.* Wells, *supra;* see Bac. Abr. (Am. ed.) 566 *et seq.*

[13]See Keppel *v.* Bailey, *supra.*

[14]Van Rensselaer *v.* Smith (N. Y. 1858) 27 Barb. 104, affd. *sub. nom.* Van Rensselaer *v.* Hayes (1859) 19 N. Y. 58. The case may be explained equally as well as a covenant necessary to the enjoyment of an incorporeal hereditament.

[15]See Masury *v.* Southworth, *supra.*

[16]Pakenham's Case (1368) Y. B. 42 Edw. III, 3; National Union Bank *v.* Segur, *supra.*

[17]See Austerberry *v.* Oldham (1885) L. T. 29 Ch. Div. 750.

[18]Austerberry *v.* Oldham, *supra.*

[19](1848) 2 Phil. 774. For a discussion of the so-called equitable easement, see 12 Columbia Law Rev. 158.

[20]Plymouth *v.* Carver (Mass. 1834) 16 Pick. 183; Cole *v.* Hughes (1873) 54 N. Y. 444.

[21]See Mygatt *v.* Coe (1891), 124 N. Y. 212, 220; Kelly *v.* Nypano R. R. (1898) 23 Pa. Co. Ct. 177; Bally *v.* Wells, *supra.*

[22]Railroad *v.* Webster (1900) 106 Tenn. 586; Fresno etc. Co. *v.* Rowell (1889) 80 Cal. 114; but see Bronson *v.* Coffin (1871) 108 Mass. 175, 180.

the medium which creates the required privity.[23] Where the term privity has been thus construed, there would appear to be no reason why all burdensome covenants which touch and concern the land should not bind grantees in fee. It is submitted, however, that a fundamental objection to a burdensome covenant is that it binds the land in perpetuity and tends to restrict its alienation at the caprice of some remote grantor,[24] and the courts should, therefore, follow the example of Chancery and exercise their discretion in enforcing agreements absolute in their effects, so that such burdens only will be upheld as can be imposed consistently with policy and principle.[25]

Certain jurisdictions which have not altogether rejected the orthodox conception of privity, have nevertheless permitted the burden of a covenant to run at law where it tends to support an easement. This relation, known as "substituted privity", exists where some subordinate interest is granted or retained by the grantor, and the covenant is necessary to the substantial enjoyment of the subordinate interest.[26] In certain other instances the burden and benefit are so inseparably connected that the grantee must take the benefit subject to the burden.[27] The principle of "substituted privity" has sometimes, however, been extended to cases in which the covenant touched and concerned the subordinate interest, but was neither necessary to nor bound up in the complete enjoyment thereof, as in the recent case of *Parrott* v. *Atlantic & North Carolina R. R.* (N. C. 1914) 81 S. E. 348, in which the plaintiff's ancestor granted a right of way to a railroad company which covenanted to erect and maintain a flag station. The covenantor assigned to the defendant, and the court decreed that the latter should continue to maintain the flag station, provided the public interests were not injuriously affected.[28] It appears to be settled that a covenant will run with an incorporeal hereditament[29] as well as with tangible realty, and if the land may be said to be the medium creating privity of estate, there would seem to be no reason why an incorporeal hereditament should not serve equally well as such medium.

Enforcement of Forfeiture Conditions in Leases for Years.— When a lease for years contains a proviso that the lease shall become void on non-payment of rent or on default in the performance of any of the lessee's covenants, the enforcement of such a stipulation is gov-

[23]See Aiken *v.* Albany etc. Ry. (N. Y. 1851) 26 Barb. 289; Allen *v.* Culver (N. Y. 1846) 3 Den. 284. Since the running of a benefit may be explained as the implied assignment of a chose in action, it does not appear necessary that any estate pass in order to create privity. See Shaber *v.* St. Paul Co., *supra.*

[24]See Keppel *v.* Bailey, *supra;* National Union Bank at Dover *v.* Segur, *supra,* p. 184.

[25]See Sexauer *v.* Wilson (1907) 136 Ia. 357.

[26]Fitch *v.* Johnson (1882) 104 Ill. 111; Norfleet *v.* Cromwell, *supra;* Bronson *v.* Coffin, *supra.*

[27]Midland Ry. *v.* Fisher (1890) 125 Ind. 19; Horn *v.* Miller (1890) 136 Pa. 640.

[28]See 14 Columbia Law Rev. 612. A grant of a right of way to a railroad has been construed in North Carolina as conferring an easement only. See Raleigh etc R. R. *v.* Sturgeon (1897) 120 N. C. 225.

[29]Bally *v.* Wells, *supra;* Van Rensselaer *v.* Hays, *supra;* Sterling Hydraulic Co. *v.* Williams (1872) 66 Ill. 393.

erned by very strict rules. According to the early English authorities, the effect of the proviso was to terminate the lease *ipso facto* upon a breach of the condition. This rule rested upon a distinction drawn by Lord Coke between conditions annexed to estates for years and those annexed to freeholds, the argument being that since an estate of freehold commenced with the formality of livery of seisin, it could not be determined upon breach of a condition without the formality of entry, whereas a term for years began without ceremony and so ended without ceremony immediately upon condition broken.[1] It soon became apparent that such a rule enabled a tenant, who wished to be freed from a troublesome lease, to avoid it at will by simply failing to pay his rent. In order, therefore, to prevent the lessee from thus taking advantage of his own wrong, the courts have since declared that even though it is provided ever so explicitly that the lease shall become void upon breach of a stipulation, the lease will be held merely voidable at the option of the lessor, and that no breach shall terminate the tenancy until the landlord has in some way signified his intention that it shall do so.[2] The earlier English rule has sometimes been followed in this country;[3] and it has been well argued that the modern rule is too strict in overriding the express stipulations of the parties to the lease, and that there is no hardship in binding the parties to the terms on which they agreed.[4] The modern rule, however, is now accepted by the great majority of our courts, which hold that the lease is not destroyed until the landlord exercises his option to avoid it.[5]

Just how that election shall be signified is a question about which there is some difficulty. When condition is broken by non-payment of rent, it is well settled that before the landlord can terminate the lease, he must first formally demand the rent in accordance with certain very technical rules,[6] unless the necessity for such demand is explicitly dispensed with by the lease,[7] or by some statute.[8] But assuming that the landlord has either made proper demand, or has been relieved of the necessity of making it, he must still signify his election to avoid the lease. In England, it appears that he must do this either by actual re-entry, or by that which is in law equivalent to re-entry, namely, by issuing in unequivocal terms a writ for the recovery of possession.[9] In this country, a few courts have said that any

[1]Pennant's Case (1596) 3 Co. 64a; Co. Lit., 214b.

[2]Rede *v.* Farr (1817) 6 M. & S. 121; Davenport *v.* Queen, L. R. [1877] 3 A. C. 115, 128-130.

[3]Sheaffer *v.* Sheaffer (1861) 37 Pa. 525; see Parmelee *v.* Oswego & Syracuse R. R. (1851) 6 N. Y. 74; Guffy *v.* Hukill (1890) 34 W. Va. 49; *cf.* 4 Kent, Comm., *128.

[4]See Shanfelter *v.* Horner (1895) 81 Md. 621.

[5]Wills *v.* Manufacturers' Natural Gas Co. (1889) 130 Pa. 222; Clark *v.* Jones (N. Y. 1845) 1 Den. 516; Deaton *v.* Taylor (1893) 90 Va. 219; 2 Tiffany, Landlord & Tenant, 1369.

[6]Parks *v.* Hays (1893) 92 Tenn. 161; Johnston *v.* Hargrove (1885) 81 Va. 118; 2 Tiffany, Landlord & Tenant, § 194f.

[7]Pendill *v.* Union Mining Co. (1887) 64 Mich. 172; see Camp *v.* Scott (1879) 47 Conn. 366.

[8]Martin *v.* Rector (1890) 118 N. Y. 476; 1 McAdam, Landlord & Tenant, §§ 188-189.

[9]Woodfalls, Landlord & Tenant (19th ed.) 364; Moore *v.* Ullcoats Mining Co., L. R. [1908] 1 Ch. 575.

clear assertion of the landlord's election is sufficient,[10] and this seems correct on principle, being in accord with the general rule regarding elections. Furthermore, the rule is a fair one in view of the attitude of the courts in construing as a waiver of the right to forfeiture, every word or act of the landlord which can possibly be interpreted as a recognition of the continuance of the tenancy after the landlord has learned of the tenant's breach.[11] The decisions, however, are unsatisfactory on this point; and until the courts come to recognize more clearly the obvious distinction between a provision allowing a landlord to re-enter for breach of a condition, and one that, in such a case, the lease shall become void,[12] the landlord would always do well to signify his election by re-entry, or, in most States, he may follow the course pursued in the recent case of *Matthews* v. *Crofford* (Tenn. 1914) 167 S. W. 695, where the landlord sought to enforce a forfeiture for non-payment of rent by bringing an action to recover possession. The tenant tried to defeat the forfeiture by tendering the accrued rent and interest into court, claiming that since there had been no re-entry, the tender was in time to destroy the landlord's right to avoid the lease. But the court, following a recognized corollary to the general rule, held that the bringing of the action was equivalent to an actual re-entry.[13] It further intimated that unless the landlord could make actual entry peaceably, he should not make it at all. This doctrine, also, is not without support;[14] but some courts still cling to the common law rule allowing forcible re-entry,[15] despite the fact that the reasons for that rule have disappeared, and that the rule itself is not conducive to the peace and good order of society.

It is submitted that in the principal case, the tenant would have stood a much better chance of succeeding had he sought his relief in equity. The courts look on forfeitures with disfavor,[16] and where, as here, one is incurred by the tenant's default in paying rent, it is well settled that a court of equity will set it aside.[17] This right of the tenant in equity is very similar to the equity of redemption which Chancery allows a defaulted mortgagor. It rests upon the theory that the proviso for forfeiture is intended merely as security for the payment of money, and that full effect can be given to it by allowing the

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[10]Bowman *v.* Foot (1860) 29 Conn. 331; Alexander *v.* Hodges (1879) 41 Mich. 691. A reletting by the landlord to another person has been held sufficient. Guffy *v.* Hukill, *supra;* Alleghany Oil Co. *v.* Bradford Oil Co. (N. Y. 1880) 21 Hun 26.

[11]See Green's Case (1582) Cro. Eliz. 3; Croft *v.* Lumley (1857) 6 H. L. C. 672, 693, 704 *et seq.;* Chase *v.* Knickerbocker Phosphate Co. (N. Y. 1898) 32 App. Div. 400; Hopkins *v.* Levandowski (1911) 250 Ill. 372.

[12]This was recognized in Guffy *v.* Hukill, *supra.*

[13]Jennings *v.* Bond (1895) 14 Ind. App. 282. This is established by statute in some States. See Cruger *v.* McLaury (1869) 41 N. Y. 219.

[14]Peacock & Hunt Co. *v.* Brooks Co. (1895) 96 Ga. 542; Thiel *v.* Bull's Ferry Land Co. (1895) 58 N. J. L. 212.

[15]Goshen *v.* People (1896) 22 Colo. 270; Fabri *v.* Bryan (1875) 80 Ill. 182.

[16]See Mexborough *v.* Whitwood etc. Council, L. R. [1897] 2 Q. B. D. 111.

[17]Palmer & Singer Mfg. Co. *v.* Barney Estates Co. (N. Y. 1912) 149 App. Div. 136; Adams *v.* Watson (1877) 59 Ala. 524; 1 Pomeroy, Eq. Jur. (3rd ed.) § 453.

tenant to pay the rent in arrears with interest and costs.[18] Where the forfeiture is for a cause other than the non-payment of money, equity is not so likely to set it aside in the absence of fraud, accident or mistake;[19] but whenever the parties can be put *in statu quo* by the mere payment of money, it seems that there are few cases in which the court will refuse relief.[20]

Avoidance of Insane Persons' Conveyances.—The voidable conveyance of an insane person may be disaffirmed,[1] and the property regained by his guardian or committee, or after a return to sanity by himself, or after his death by his personal representative or heirs;[2] and this right may even be exercised against *bona fide* purchasers from the grantee.[3] As to the method which should be employed to avoid the conveyance, however, there is a conflict of authority. In the recent case of *Walton* v. *Malcolm* (Ill. 1914) 106 N. E. 211, it was held that the heirs of a grantor alleged to have been insane at the time of making a conveyance, could not give evidence of such insanity in an action of ejectment brought by them against the heirs of the grantee to recover possession of the land.[4] It is axiomatic that legal title alone can support an action of ejectment,[5] and since the deed is merely voidable, it is said to pass the legal title and be avoidable only upon equitable grounds.[6] Nevertheless, in most jurisdictions, a grantor, insane at

[18]See Horton *v.* New York & H. R. R. R. (1883) 12 Abb. N. C. 30, affd. 102 N. Y. 697.

[19]Gordon *v.* Richardson (1904) 185 Mass. 492; see Sheets *v.* Sheldon (1868) 7 Wall. 416; Kann *v.* King (1907) 204 U. S. 43.

[20]It is said that equity will grant relief even where the tenant's default is wilful. See Mactier *v.* Osborn (1888) 146 Mass. 399. In fact, the tenant is so favored, that in the principal case it might still not be too late for him to seek relief, for even in States where courts of law and equity are united, and a defendant is required to set up by answer any equitable defense or right to affirmative relief which he may have, it is held that the tenant does not lose his right to an injunction by failing to set it up against the landlord's action for possession. Giles *v.* Austin (1875) 62 N. Y. 486.

[1]As to what contracts and conveyances are voidable, see 14 Columbia Law Rev. 674.

[2]1 Devlin, Real Estate (3rd ed.) § 75.

[3]Hovey *v.* Hobson (1867) 53 Me. 451; Dewey *v.* Allgire (1893) 37 Neb. 6; *contra*, Odom *v.* Riddick (1889) 104 N. C. 515. Most courts make a return of the consideration a condition precedent to avoidance, on the ground that it is inequitable to take land from an innocent grantee unless he can be put *in statu quo*. 1 Devlin, Real Estate (3rd ed.) § 76. Others, on the contrary, hold that to require restitution would be to withdraw the very protection which the law seeks to afford. Gibson *v.* Soper (Mass. 1856) 6 Gray 279; see Hovey *v.* Hobson, *supra*.

[4]The following cases support this view: Moran *v.* Moran (1895) 106 Mich. 8; McAnaw *v.* Clark (1902) 167 Mo. 443.

[5]Shipman, Common Law Pleading, 123; Fenn *v.* Holme (1859) 62 U. S. 481, 483.

[6]Warvelle, Ejectment, § 334. The right of the insane person to recover his property can hardly be said to be equitable only, since the right of recovery exists even against *bona fide* purchasers for value. See note 2, *supra*.

the time of conveyance, is allowed to maintain an action of ejectment to recover his property and to give evidence of his insanity to avoid his deed.[7] The courts, in such jurisdictions, usually attempt to draw an analogy with the cases where a defrauded grantor is permitted to bring ejectment,[8] or where an infant, after becoming of age, is permitted to bring an action of ejectment to avoid his conveyance made during infancy.[9]

There is no difficulty on principle in allowing an insane person to bring an action of ejectment to avoid his conveyance, but the logical solution is to be found in a consideration of what effects a transfer of title, rather than in an endeavor to create an exception to the rule that ejectment can be brought only upon a legal title. It was a recognized principle of the common law that an estate of freehold could not begin nor end without ceremony;[10] a re-entry being considered of sufficient solemnity to revest title in the grantor of a conditional estate for condition broken,[11] and in the same way, an infant after becoming of age, regained property he had conveyed away.[12] The usual reason given why a lunatic upon becoming sane could not do this was that a man will not be permitted to stultify himself.[13] Once having overthrown this limitation, and having given a lunatic the right personally to avoid his conveyances, then he stands on the same footing with the grantors whose conveyances the law said were voidable for infancy,[14] or for condition broken.

The use of deeds in conveyancing in place of the old method of feoffment by livery of seisin, has not changed the principle of the law as to the vesting or devesting of estates, either in the case of the recovery of an estate for condition broken, or in the recovery of property conveyed away during infancy,[15] or lunacy.[16] The strict rule of the common law has, however, been relaxed, so that bringing an

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[7]1 Devlin, Real Estate (3rd ed.) § 73a. It should be noted, that in some cases cited to sustain this position, the propriety of bringing ejectment to recover property conveyed under a voidable title is not in issue, since some courts hold the deed void, Farley *v.* Parker (1876) 6 Ore. 105, or the case arises under a code. Phillips *v.* Gorham (1858) 17 N. Y. 270. Although Smith *v.* Ryan, *infra*, was decided in a code State, the complaint alleged only a cause of action at law, and it was tried on that basis.

[8]See Smith *v.* Ryan (1908) 191 N. Y. 452. Starting out with the proposition that an insane person's deed is voidable, cases in which a defrauded grantor is allowed to bring ejectment are not in point, since to maintain such an action there must have been fraud in the inception of the deed, in which case it is not voidable but a nullity. See Warvelle, Ejectment, § 254.

[9]See Hovey *v.* Hobson, *supra*.

[10]Co. Lit., 214b, (2).

[11]4 Kent, Comm., *127.

[12]2 Reeves, Real Property, 1444. One having the right of entry may bring ejectment. Shipman, Common Law Pleading, 122.

[13]See 4 Columbia Law Rev. 433.

[14]Whether or not there was any justification for the analogy drawn between infants' and lunatics' conveyances, both are to-day voidable, and it is submitted, therefore, that the procedure as to avoidance should be the same.

[15]See Touch *v.* Parsons (1765) 3 Burr. 1794.

[16]See Allis *v.* Billings (Mass. 1843) 6 Metc. 415.

action of ejectment is a sufficient act of disaffirmance in the case of a recovery for condition broken,[17] while in the case of infancy all that is necessary to give the grantor the right to possession is some overt act of disaffirmance such as a subsequent deed to a third person, or an action to set aside the deed or to recover possession of the premises.[18] Since, therefore, there has been this modification in the case of other conveyances which at law are held to be voidable, there seems to be no reason for not applying the same rule to lunatics' voidable conveyances and allowing an action of ejectment; the bringing of the action to serve the double purpose of revesting title and recovering possession.[19]

Vesting of Unregulated Discretion in Officers by Ordinance.—The first prerequisite to the validity of any ordinance is that the municipality confine itself to the powers set forth in its charter of incorporation. This question comes up in cases where the municipality, under its general powers to declare and regulate nuisances, forbids the doing of certain acts without the consent of an officer, for if it has no power over the particular subject matter, the vesting of an uncontrolled discretion in an administrative agent to act in respect to it is of itself regulation and clearly invalid. The power of the municipality is restricted to declaring that a nuisance which is a nuisance *per se,* or which, under the circumstances, is in fact so, and the court has the final voice as to what constitutes a nuisance.[1] In the recent case of *Ex parte Broussard* (Tex. 1914) 169 S. W. 660, an ordinance making it unlawful to maintain stock pens including more than six heads of cattle within 300 feet of any residence or hotel without a permit from the city council, was held, one judge dissenting, to be within the powers of the municipality and valid. It is obvious that stock pens when maintained in cities or populated sections may become nuisances and so subject to regulation as such.[2]

But the objection was urged that the ordinance was void because it vested an uncontrolled and arbitrary discretion in the administrative agents. Similar ordinances have been declared void on the ground that they are unreasonable,[3] and this without any apparent recourse to constitutional objections. The reasoning of the courts in many instances proceeds upon the theory that an ordinance which places within the arbitrary discretion of an individual, or set of individuals, the power to prohibit acts not of such a nature as to justify prohibition, is an unreasonable exercise of the municipal function.[4] But where

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[17] 1 Tiffany, Real Property, § 74; *cf.* note on "Enforcement of Forfeiture Conditions in Leases for Years", at p. 58, *supra.*

[18] 2 Reeves, Real Property, 1444.

[19] See 2 Reeves, Real Property, 1445.

[1] McQuillin, Municipal Ordinances, §§ 441, 442; see Laugel *v.* City of Bushnell (1902) 197 Ill. 20.

[2] Joyce, Law of Nuisances, §§ 208, 209. In Hagerstown *v.* Baltimore & O. R. R. (1908) 107 Md. 178, a case somewhat similar to the main case, the court intimated that stockyards were not nuisances *per se.* The fact that the ordinance worked oppressively in this particular instance, seems to have been largely responsible for the dictum.

[3] See 2 Dillon, Municipal Corporations (5th ed.) § 598.

[4] Matter of Frazee (1886) 63 Mich. 396; City of Chicago *v.* Trotter (1891) 136 Ill. 430.

the ordinances have been sustained, the courts seem to follow the rule that if the act is one which may be regulated, there is no objection to the exercise of such a power in the form of a prohibition unless a permit is secured.[5] It is evident that the latter rule is open to the objection that the power to regulate does not include the power to prohibit arbitrarily.

It would seem that the question of reasonableness or unreasonableness is to be determined in the light of constitutional limitations, and that declaring an ordinance unreasonable is but another way of saying that the ordinance is repugnant either to the State or federal constitution. The test of constitutionality which the State courts seem to apply, is that if the ordinance deals with a fundamental right it is void, since the exercise of inherent and fundamental rights cannot be made to depend upon the uncontrolled discretion of a non-judicial body,[6] inasmuch as this places the individual without the domain of the law and so denies him due process. If, on the other hand, it deals with a thing which may be prohibited altogether, something which the individual had no right to do, then he has little cause to complain of the fact that there is an arbitrary discretion in an administrative body to grant or withhold the privilege,[7] especially since it is always presumed that the officer will not act arbitrarily, and if he does so act, the aggrieved party is, as a rule, afforded relief.[8] An ordinance is unconstitutional, therefore, which makes it unlawful for persons without first procuring a permit, to parade,[9] or to engage in the dairy business,[10] or to establish a private meat market,[11] or to engage in a business dealing with explosive oils,[12] since, in the opinion of the court, it deals with the exercise of a fundamental right. But, on the contrary, an ordinance is valid which vests a discretion in administrative agents to license a nuisance, or something which the individual has no inherent right to

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[5]See 2 Dillon, Municipal Corporations (5th ed.) § 598; *cf.* Elliott, Municipal Corporations (2nd ed.) § 156.

[6]City of Richmond *v.* Dudley (1891) 129 Ind. 112; State *v.* Mahner (1891) 43 La. Ann. 496.

[7]Quincy *v.* Kennard (1890) 151 Mass. 563; *In re* Flaherty (1895) 105 Cal. 558; Love *v.* Judge of Recorder's Court (1901) 128 Mich. 545.

[8]It is not clear in just what cases mandamus will issue to compel an officer to perform a duty involving the exercise of discretion. See People *v.* Grant (1891) 126 N. Y. 473, where it was refused. When, however, the administrative agent, arbitrarily and plainly without any reason, refuses to grant a license, mandamus should lie. Sansom *v.* Mercer (1887) 68 Tex. 488; C. B. George & Bro. *v.* City of Winchester (1904) 118 Ky. 429.

[9]*Cf.* Anderson *v.* City of Wellington (1888) 40 Kan. 173; City of Chicago *v.* Trotter, *supra;* Matter of Frazee, *supra.*

[10]*Cf.* State *v.* Mahner, *supra;* but see People *v.* Vandecarr (1903) 175 N. Y. 440, in which a similar ordinance was held constitutional. The latter decision illustrates the tendency of the State to give wide scope to the operation of administrative law. This tendency is sanctioned by the Supreme Court, which, in Fischer *v.* St. Louis (1904) 194 U. S. 361, refused to declare unconstitutional an ordinance like the one in the New York case.

[11]State *v.* Dubarry (1892) 44 La. Ann. 1117.

[12]City of Richmond *v.* Dudley, *supra.*

do, like one forbidding the beating of drums in the street,[13] or the making of public addresses in public places.[14]

In the Supreme Court, however, the question takes on a different aspect. Every presumption is in favor of the constitutionality of the ordinance; the determination by the State court that the ordinance deals with a nuisance or a non-fundamental right carries great weight, and the Supreme Court will be inclined to uphold it.[15] The Court, moreover, has gone even further, and has held that the vesting of complete discretion in reference to a proper subject of the police power is not of itself repugnant to the Fourteenth Amendment.[16] The decision, indeed, seems broad enough to include ordinances dealing with fundamental rights, although it is open to question as to whether it is an authority for anything more than an attempt to confine the application of *Yick Wo* v. *Hopkins*[17] to its precise circumstances. From the decisions so far, therefore, it may be said that wherever the subject regulated cannot be claimed as an inherent right, and may be altogether prohibited,[18] or where it is a proper subject of regulation under the police power of the State,[19] and there is no showing of any general practice of making arbitrary discriminations, the provisions of the Fourteenth Amendment are satisfied.[20]

It is to be noted, however, that the fact that a thing may be prohibited to all does not mean that it can be arbitrarily prohibited to some and not to others. In providing for the "equal protection of the laws", the Fourteenth Amendment guarantees against inequality of privileges; it guards against arbitrary dispensation of privileges, as well as infringements of rights by the State.[21] The vesting of uncontrolled discretion, whether in reference to fundamental rights or not, results in a grave possibility of special privileges. It would seem, therefore, that in all such cases the Fourteenth Amendment is not to be lightly reckoned with, and that unless comparatively small interests are involved and a strong governmental necessity exists for administrative regulation, the constitutionality of an ordinance vesting unregulated discretion can be seriously questioned.[22]

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[13] *In re* Flaherty, *supra.*

[14] Love *v.* Judge of Recorder's Court, *supra.*

[15] Davis *v.* Massachusetts (1897) 167 U. S. 43; Wilson *v.* Eureka City (1899) 173 U. S. 32.

[16] Lieberman *v.* Van De Carr (1905) 199 U. S. 552, at p. 562, the Court says: "the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is a proper subject of regulation within the police power of the State is not violative of rights secured by the Fourteenth Amendment."

[17] (1886) 118 U. S. 356. In this case, the ordinance vested unregulated discretion in reference to a legitimate business, and flagrant discriminations had actually been practiced.

[18] See note 17; Crowley *v.* Christensen (1890) 137 U. S. 86, 94.

[19] Liebermann *v.* Van De Carr, *supra;* Fischer *v.* St. Louis, *supra.*

[20] The recent case of Cutsinger *v.* City of Atlanta (Ga. 1914) 83 S. E. 263, represents the inclination of the State court to make a broad application of these principles enunciated by the Supreme Court.

[21] Freund, Police Power, §§ 639, 640; Cooley, Constitutional Limitations (7th ed.) 561, 562.

[22] Freund, Police Power, §§ 643, 644; 2 Willoughby on the Constitution, 1296.

Dismissal of Public Officers for Cause.—When an officer does not hold his position at the arbitrary will of the appointing power, it is generally admitted that he is entitled to a hearing before being dismissed.[1] But although there seems to be little doubt on this point, courts are by no means unanimous in the reasons they give for so deciding. It is said by some that the right to hold office is a property or quasi-property right, of which one may not be deprived except by due process of law;[2] others, more cautiously, declare that whether property or not, the right to hold office is a valuable one which courts are zealous to protect.[3] Such reasons, however, are really beside the point, when the legislature has declared that an officer can be removed only "for cause"[4] or for any definite reasons, for it then becomes the duty of the courts simply to decide what procedure is necessary to effectuate this method of removal and no consideration of substantive rights is required.[5]

In the application of such statutes, the necessity of giving the individual every right that he is intended to have is balanced by the courts with the importance to efficient government of the speedy removal of inefficient officers. Accordingly, although it is sometimes said that such proceedings are of a judicial nature,[6] they are never required to approach the technical exactness of a trial at law.[7] It is at least essential that the accused be given seasonable notice of the charges, clearly and unambiguously expressed,[8] and a fair opportunity

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[1]Singleton *v.* Commissioners etc. (S. C. 1797) 2 Bay 105; Ekern *v.* McGovern (1913) 154 Wis. 157, 234; Dullam *v.* Willson (1884) 53 Mich. 392; State *v.* Johnson (1892) 30 Fla. 433; Osgood *v.* Nelson (1872) 41 L. J. Q. B. 329.

[2]See Ekern *v.* McGovern, *supra,* p. 239; Wammack *v.* Holloway (1841) 2 Ala. 31.

[3]See Andrews *v.* King (1885) 77 Me. 224.

[4]Where the statute does not define "cause", it has been interpreted to mean substantial cause as opposed to the arbitrary conclusion of one having power of summary removal. People *v.* Starks (N. Y. 1884) 33 Hun 384; see Gibbs *v.* Manchester (1905) 73 N. H. 265.

[5]See Christy *v.* City of Kingfisher (1904) 13 Okla. 585, 590; Devault *v.* Mayor of Camden (1886) 48 N. J. L. 433.

[6]Arkle *v.* Board of Commissioners (1895) 41 W. Va. 471; People *v.* Police Commissioners (1898) 155 N. Y. 40; Dullam *v.* Willson, *supra;* Murdock *v.* Phillips Academy (Mass. 1831) 12 Pick. 244; *contra,* Donahue *v.* County of Will (1881) 100 Ill. 94, 107 *et seq.;* State *v.* Hawkins (1886) 44 Ohio St. 98; see Pierce's Appeal (1906) 78 Conn. 666. The difference of opinion as to whether such proceedings are judicial or administrative, seems to have been due to the hesitancy of courts to review any executive act of the governor whatsoever. See Matter of Guden (1902) 171 N. Y. 529. The better view now is that the courts may review a governor's acts with a view to determining whether he has proceeded in the manner intended by statutes giving him certain powers to be exercised in a given way. See 13 Columbia Law Rev. 754. Accordingly, the distinction between the judicial actions of a governor and his executive acts to be done in a particular way, is not of importance in determining the jurisdiction of the court.

[7]Devault *v.* Mayor of Camden, *supra;* 2 Dillon, Municipal Corporations (5th ed.) § 482; see Andrews *v.* King, *supra.*

[8]See People *v.* York (1901) 166 N. Y. 582. In People *v.* Humphrey (1898) 156 N. Y. 231, it was held that an officer could not be charged and tried for one offense, and then dismissed for another not contained in the

to defend himself.[9] There is no fixed test as to what is seasonable notice, which must depend largely on the circumstances of the particular case;[10] nor is there any set rule as to what are the essentials of a fair hearing. The right to be confronted by witnesses, and the right to cross-examine and to summon witnesses in defense, are important;[11] and, in some cases, failure to have witnesses properly sworn has been held to be reversible error.[12] Furthermore, the right of the accused to be represented by counsel has been held to be a vital part of a fair hearing,[13] but other courts have decided that the granting of this right is within the discretion of the removing power.[14] In the recent case of *State ex rel. Arnold* v. *City of Milwaukee* (Wis. 1914) 147 N. W. 50, where the city council, in proceedings leading to the amotion of a tax commissioner, refused to allow him to be represented by counsel, such refusal was held to invalidate the proceedings. From the facts of the case the court was undoubtedly correct in so deciding, but if it was meant that, in every case, failure to allow counsel constitutes reversible error as a matter of law, it seems that they went too far. The duty of the courts in reviewing cases of this sort on appeal, is merely to determine whether or not the accused officer has had a fair hearing in the broadest and most untechnical sense of the term. In doing so, they may well take into account the nature and complexity of the charges, and the importance of the office at stake,[15] as in the principal case. It has been pointed out, that the right to reasonable notice both in point of time and in a clear statement of the charges, and the right to a fair hearing, are indispensable requirements; and yet the accused might conceivably waive his right to either.[16] The same reasoning would apply to cases where the right to summon witnesses or to be represented by counsel is denied. Such denials may be said to raise a presumption, in the case of failure to give notice a very strong presumption, in the case of failure to allow counsel, a

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notice, nor put in issue at the hearing. A further reason for requiring a clear exposition of the charges is to enable a court on appeal to decide whether from the facts alleged the removing body could reasonably have found as they did. See Mullane *v.* City of South Amboy (N. J. 1914) 90 Atl. 1030. But the charges need not be drawn in the technical language or manner of an indictment. Joyce *v.* City of Chicago (1905) 216 Ill. 465.

[9]The dismissal should not be the result of *ex parte* proceedings. Murdock *v.* Phillips Academy, *supra;* Bowlby *v.* Dover (1902) 68 N. J. L. 97.

[10]See Duerr *v.* Newark (1893) 55 N. J. L. 272; Ekern *v.* McGovern, *supra,* 278; State *v.* City of St. Louis (1886) 90 Mo. 19; People *v.* York, *supra;* Throop, Public Officers, § 364; but see *Ex parte* Wiley (1875) 54 Ala. 226, in which case, failure to give notice was held to be a mere irregularity.

[11]Matter of Dumahaut (N. Y. 1899) 43 App. Div. 56; O'Neill *v.* Mansfield (N. Y. 1905) 47 Misc. 516; see People *v.* Nichols (1880) 79 N. Y. 582; *cf.* Reilly *v.* Jersey City (1900) 64 N. J. L. 508.

[12]Tompert *v.* Lithgow (Ky. 1866) 1 Bush. 176; People *v.* Police Commissioners, *supra.*

[13]People *v.* Flood (N. Y. 1901) 64 App. Div. 209; *cf.* People *v.* Nichols, *supra*; see Dillon, Municipal Corporations (5th ed.) § 482.

[14]Avery *v.* Studley (1901) 74 Conn. 272; see People *v.* Police Commissioners (N. Y. 1883) 31 Hun 209.

[15]See People *v.* Thompson (1884) 94 N. Y. 451, 465.

[16]*Cf.* People *v.* French (1886) 102 N. Y. 583, 586.

much weaker one, that the dismissed officer has not had a fair trial. But if evidence is given showing that the right was waived, or if not waived, that no injustice in fact resulted, it seems clear that the presumption is rebutted. To adopt any other rule tending to make proceedings of this sort rigid or technical, is to give to them the character of a trial at law, which is as little the true interpretation as to allow, on the other hand, the proceedings to become mere formalities gone through by a removing power exercising in reality the right of arbitrary dismissal.

CONTROL OF NAVIGABLE WATERS.—At common law, the ownership of the beds of tidal waters was regarded as *jus privatum,* vested in the crown; but the right to use and control both the submerged land and the water was deemed *jus publicum,* vested in Parliament in trust for the public for the purposes of navigation and fishing. Subject to this parliamentary control, the crown could convey the soil under water to private individuals.[1] In this country, upon admission to the Union, the State succeeds to both the *jus privatum* of the crown and the *jus publicum* of Parliament, and title to the beds not only of tidal waters, but also of navigable inland waters, passes either to the State or the riparian owner.[2] Thus the State, in its capacity as successor to the crown, may grant submerged soil which may not be used, however, to impair the public right of navigation and fishing which in its capacity as successor to Parliament, it holds in trust for the people.[3]

The States have plenary authority over navigation, subject, however, to the supreme and paramount control thereof vested in Congress under the Commerce Clause.[4] Under this provision Congress may authorize the improvement[5] and obstruction[6] of navigable streams, and is the sole judge of the necessity and reasonableness of

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[1]1 Farnham, Waters & Water Rights, 165-172.

[2]In Pollard's Lessee *v.* Hagan (1845) 3 How. 212, it was declared that the title to the soil of navigable waters passed to the State upon admission to the Union. The waters in question were tidal, and as at that time the admiralty jurisdiction of the United States was held to apply only to tidal waters, the decision must be limited to its facts. The case of Genesee Chief *v.* Fitzhugh (1851) 12 How. 443, decided that the admiralty jurisdiction of the United States extended to all navigable waters, and as a result, the ownership of soil under all such waters vested either in the State or in the riparian owners depending on the local law. St. Anthony etc. Co. v. St. Paul Water Commissioners (1897) 168 U. S. 349; see United States *v.* Chandler-Dunbar Water Power Co. (1913) 229 U. S. 53. See 13 Columbia Law Rev. 531 *et seq.,* for a discussion of the various views relating to the ownership of the bed of a navigable stream.

[3]Parliament is, of course, bound by no constitutional restrictions, and may act as it sees fit in governmental matters, 1 Farnham, Waters & Water Rights, 170, whereas the State may act solely with reference to the powers reserved to it by virtue of the Constitution.

[4]U. S. Const., Art. 1, § 8, subd. 3. Gibbons *v.* Ogden (1824) 9 Wheat. 1, 189 *et seq.*

[5]Gibson *v.* United States (1897) 166 U. S. 269. When Congress has authorized an improvement, an act under the authority of a State in derogation of Congress' action, will be enjoined. United States *v.* Rum River etc. (C. C. 1870) 1 McCrary 397.

[6]Miller *v.* Mayor of New York (1883) 109 U. S. 385; South Carolina *v.* Georgia (1876) 93 U. S. 4.

such legislation.[7] Where Congress has acted, the States may not act;[8] but in the absence of federal legislation on the subject, a State may authorize the obstruction of navigation,[9] if, in the administration of its public trust, the legislature deems it to be for the public benefit, for inasmuch as the trust is for the advantage of the public, it should be administered in a liberal manner by balancing the rights of the community to use navigable waters with the ultimate benefit secured to it by reason of the obstruction. A State, therefore, may grant full control of the soil under navigable waters for the purpose of improving navigation, giving to the grantee the right to exact tolls for the use of the stream until fully compensated.[10] But such a situation differs essentially from one where the State grants the title to, and complete control over, land under navigable waters to a private company to be used for a purpose which only remotely, and in a slight degree, benefits the public. In such a case, the State, in violation of the public trust, divests itself of its right to improve the stream, and it "can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, * * * than it can abdicate its police powers in the administration of government and the preservation of peace."[11]

In the recent case of *Long Sault Development Co.* v. *Kennedy* (1914) 212 N. Y. 1, the question arose as to the validity of a grant of land under the St. Lawrence River to a corporation for the purpose of using the water to develop electric energy, with the right to erect locks, dams, and bridges, to further the enterprise, on condition that "navigation shall be preserved in as good condition as, if not better than," at the time of the grant. The grant was further conditioned on congressional authorization of the undertaking. It was held that the grant gave the corporation full control of the river to the exclusion of the State, which lost its right to improve the navigation at any time, and as such, was void as a violation of the public trust hereinbefore discussed.[12] Collin, J., dissented on two grounds. In the first place, he declared that the grant did not vest complete control of the river in the corporation. Secondly, assuming that it did, the development of electric energy being of benefit to the community, the legislature, in the administration of its public trust, could balance conveniences and authorize obstructions to navigation where public interest required. There is doubtless a distinction between a case where

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[7]Gibbons *v.* Ogden, *supra,* p. 196.

[8]Gibbons *v.* Ogden, *supra,* p. 209 *et seq.*

[9]Willson *v.* Black Bird Creek Marsh Co. (1829) 2 Pet. 245; Escanaba Co. *v.* Chicago (1882) 107 U. S. 678. Congress may remove an obstruction to navigation authorized by a State. Hannibal Bridge Co. *v.* United States (1911) 221 U. S. 194, even though at the time the obstruction was erected Congress had not acted. Union Bridge Co. *v.* United States (1907) 204 U. S. 364. The question whether a navigable stream running through two States may be obstructed by one of the States in the absence of congressional legislation on the subject, is unsettled. See Rhea *v.* Newport, N. & M. V. R. R. (C. C. 1892) 50 Fed. 16; but see Palmer *v.* Commissioners of Cuyahoga County (C. C. 1843) 3 McLean 226.

[10]Wisconsin etc. Co. *v.* Manson (1877) 43 Wis. 255.

[11]Illinois Central R. R. *v.* Illinois (1892) 146 U. S. 387, 453.

[12]The statute in the principal case was repealed before the question came before the Court of Appeals, a fact which may have had some influence on the court's decision.

an obstruction to navigation is authorized, the State, nevertheless, retaining control over the river, and one where the State completely divests itself of control over the navigation of a stream. On the facts of the principal case, however, the dissenting view seems preferable, as the grant might reasonably have been construed to reserve to the State the right to enter and improve the stream whenever it should see fit, for the presumption that such a right is reserved seems sufficiently strong to warrant the courts to require overwhelming proof of its abandonment.

ASSIGNABILITY OF CONTRACTS.—It was the rule of the ancient common law that a chose in action could not be alienated or assigned except by the king or to him, and for the reason that a chose in action presupposes a personal relation which cannot be transferred.[1] But this hard and fast rule was soon avoided by the device of a power of attorney, allowing the grantee of the power to use the grantor's name in a suit at law on the obligation.[2] If after the assignment so effected the assignor will not allow the suit in his name, or if, after notice, the obligor and the assignor have colluded in derogation of the assignee's rights at law, the assignee may bring a bill in equity to enforce his rights.[3] Not a few jurisdictions have adopted statutes allowing the assignee, as the real party in interest, to sue at law in his own name;[4] but such a statute works no change in the fundamental rights of the parties, and involves merely a change of procedure.[5]

If, therefore, one of the contracting parties possesses a contract right to demand some obligation from the other, and if such right is unattended by a reciprocal duty or obligation, there is no difficulty in giving full effect to an assignment of it, as of a mere chose in action.[6] When, however, rights arising from executory contracts are coupled with obligations, no such sweeping doctrine as to their assignability is applicable. Executory contracts are held to be not assignable when they impose upon him who attempts to assign a relation of trust

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[1]See essay by J. B. Ames on the Inalienability of Choses in Action, Ames' Lectures on Legal History, 210, which declares unsound the view that the rule rests on an aversion to maintenance. See Lampet's Case (1613) 10 Co. *46a; 2 Bl., Comm., *442.

[2]2 Bl., Comm., *442; see Glenn *v.* Marbury (1892) 145 U. S. 499. From this it follows that the assignee can have no better claim than his assignor. Any payment to the assignor, moreover, before notice of the assignment is given the obligor, is binding as against the assignee. Pollock, Contracts (8th ed.) 499.

[3]See Hayward *v.* Andrews (1882) 106 U. S. 672; Hammond *v.* Messenger (1838) 9 Simon *327. Since assignment proceeds on the theory of agency, any satisfaction rendered the assignor, being a satisfaction of the principal, constitutes a valid defense in a suit at law by the assignee, the agent.

[4]New York Code of Civil Procedure, § 449; California Code of Civil Procedure, § 367; Burn's Annotated Indiana Statutes, § 251.

[5]Glenn *v.* Busey (D. C. 1886) 5 Mack. 233. In this country where law and equity are administered by the same courts, a court of law will take cognizance of equitable grounds of relief in favor of the assignee. Welch *v.* Mandeville (1816) 1 Wheat. 233.

[6]Pollock, Contracts (8th ed.) 499.

or confidence,[7] or if it would be inconsistent with the nature of the contract and the rights of the parties to presume that they contemplated other than performance in person.[8] On the other hand, when the contract is so impersonal as not to fall within either of these prohibitions, it is assignable, even though executory, in the absence of any express limitation on assignment in the contract itself.[9] This rule rests on the ground that if the promissor could not object to performance by a *bona fide* agent of the assignor, he should not be allowed to object to performance by an assignee merely because he possesses an interest in connection with his power as agent. In general, the same rule applies to the assignment of executory contracts by act of the parties which applies to their assignment or transfer by operation of law;[10] but while the rule is capable of satisfactory definition, in its application to each case the decision necessarily rests upon the particular facts involved. Accordingly, different jurisdictions applying the same principle reach apparently conflicting results; a contract with a State to do its printing being held in one court to be assignable,[11] and a similar contract with a county being held by another court to be so personal as to inhibit any assignment;[12] and contracts for building public works are in most jurisdictions assignable,[13] but not in all.[14] Similarly, while contracts to install electric lighting,[15] and for setting out and pruning fruit trees,[16] are held to be so personal as to prevent their assignment, a contract for painting and decorating is not of such a personal nature.[17] In the recent case of

[7]Arkansas Valley Smelting Co. *v.* Belden Mining Co. (1888) 127 U. S. 379; 3 Page, Contracts, § 1262.

[8]Sloan *v.* Williams (1891) 138 Ill. 43; Chitty, Contracts (11th Am. ed.) 1363; 3 Page, Contracts, § 1262. But the right to payments to become due on an executory contract which imposes a trust or calls for strictly personal services on the part of the assignor, can be so separated from the performance of the contract as to render an assignment of such payments binding when earned. Sharp *v.* Edgar (N. Y. 1849) 3 Sandf. 379.

[9]Devlin *v.* Mayor (1875) 63 N. Y. 8.

[10]Sears *v.* Conover (N. Y. 1861) 34 Barb. 330; *cf.* White's Executors *v.* Commonwealth (1861) 39 Pa. 167; see Devlin *v.* Mayor, *supra;* Hyde *v.* Dean & Canons of Windsor (1597) Cro. Eliz. 552.

[11]Carter *v.* State (1895) 8 S. Dak. 153.

[12]Campbell & Hood *v.* Sumner County (1902) 64 Kan. 376. The court, in this case, considered its decision to be squarely opposed to Carter *v.* State, *supra,* but it would seem that the cases might have been distinguished on the ground that in the latter case there was public bidding for the contract, which tended to show that performance in person was not important.

[13]Anderson *v.* De Urioste (1892) 96 Cal. 404; see City of St. Louis *v.* Clemens (1867) 42 Mo. 69; Ernst *v.* Kunkle (1856) 5 Ohio St. 520.

[14]Pike *v.* Waltham (1897) 168 Mass. 581. This case proceeds on the theory that if the assignee had been allowed to pursue the contract the city would have lost its right against the assignor for any breach. The implied novation suggested, however, is not in accord with the weight of authority, which continues the assignor's liability for breach after assignment. Pollock, Contracts (8th ed.) 499; Rochester Lantern Co. *v.* Stiles Co. (1892) 135 N. Y. 209.

[15]Swarts *v.* Narragansett Electric Lighting Co. (1904) 26 R. I. 388.

[16]*Cf.* Edison *v.* Babka (1896) 111 Mich. 235.

[17]See Janvey *v.* Loketz (N. Y. 1907) 122 App. Div. 411.

Nassau Hotel Co. v. *Barnett & Barse Corporation* (N. Y. Sup. Ct. App. Div. 1st Dept.) 162 App. Div. 381, it was held that where the owner of a hotel leased the premises and furnishings to an experienced hotel man and agreed to accept a percentage of the gross receipts as rental, the contract of lease was not assignable to a corporation, as the lessor had depended on the experience and reliability of the lessee in making the lease. This seems to be clearly correct within the principle that contracts of a personal nature are not assignable, for the reason that the profits of the lessor depended directly upon the skill and efficiency with which the hotel was conducted.[18]

[18]Contracts in partial restraint of trade are held to be assignable to a vendee of the business with respect to which they were made. Hedge, Elliott & Co. *v.* Lowe (1877) 47 Ia. 137; Francisco *v.* Smith (1894) 143 N. Y. 488; Diamond Match Co. *v.* Roeber (1887) 106 N. Y. 473; Up River Ice Co. *v.* Denler (1897) 114 Mich. 296. Contracts for support and maintenance are not assignable. Clinton *v.* Fly (1833) 10 Me. 292; Bethlehem *v.* Annis (1860) 40 N. H. 34.

RECENT DECISIONS.

ARNOLD BROCK, *Editor-in-Charge.*
CYRIL J. CURRAN, *Associate Editor.*

BILLS AND NOTES—NEGOTIABILITY—REFERENCE TO EXTRINSIC AGREEMENT.—A promissory note contained the words "value received as *per* contract." *Held,* since the language refers merely to the origin of the consideration and does not indicate that the promise was intended to be modified or restricted by the agreement mentioned, the negotiability of the instrument is unimpaired. *National Bank of Newbury* v. *Wentworth* (Mass. 1914) 105 N. E. 626.

It is elementary that an instrument to be negotiable must be payable unconditionally, 1 Daniels, Negotiable Instruments (6th ed.) § 41, but whether this essential requisite is destroyed by reference to a collateral agreement is often hard to determine. When a note declares itself to be issued or held as security for other obligations, the promise is made solely for the purpose of meeting any default upon them, and therefore is binding only to the extent that such obligations are not satisfied when the note becomes due. *Haskell* v. *Lambert* (Mass. 1860) 16 Gray 592; *American National Bank* v. *Sprague* (1884) 14 R. I. 410. A statement, however, that it is given "on" a certain policy of insurance is only a recital of the consideration for it; *Taylor* v. *Curry* (1871) 109 Mass. 36; see *Union Ins. Co.* v. *Greenleaf* (1874) 64 Me. 123; but if the words are, "subject to the policy," or other contract, the reasonable inference is that payment is to be governed by the stipulations to which the contract refers. *American Exch. Bank* v. *Blanchard* (Mass. 1863) 7 Allen 333; *Klots etc. Co.* v. *Manufacturers etc. Co.* (C. C. A. 1910) 179 Fed. 813; *Rieck* v. *Daigle* (1908) 17 N. Dak. 365. The question is one of interpretation. When the reference to an extrinsic contract is such as to indicate that the promise in the note is limited by the terms of that contract, the negotiable character of the note is destroyed; *Dilley* v. *Van Wie* (1858) 6 Wis. *209; see *Parker* v. *American Exch. Bank* (1894) 27 S. W. 1071; but if the intention so to limit it is not clear it seems the language of the maker will be construed most strongly against him and the negotiability of the note upheld. See *Clanin* v. *Esterly etc. Co.* (1888) 118 Ind. 372; *Bank* v. *Badham* (1910) 86 S. C. 170.

CARRIERS—RIGHT OF OWNER TO CHANGE DESTINATION.—The owner of cotton which had been delivered to defendant railroad at Cooper for shipment to Houston, requested, before the shipment had started, a redelivery to himself at Cooper. The defendant's agent refused the request, and the cotton was shipped on to Houston. The market price at Cooper and Houston being different, the plaintiff suffered damage for which he now sues. *Held,* the plaintiff could recover. *Texas Midland R. R.* v. *Hargrove* (Tex. 1914) 169 S. W. 925.

Although a carrier must in general follow closely the instructions given at the time the goods are accepted for shipment, see *McKahan* v. *American Ex. Co.* (1911) 209 Mass. 270, it is well settled that the owner of the goods, whether shipper or consignee, may, as an incident of his ownership, change his instructions as to the destination, and the carrier is liable if the latter directions are not obeyed. *Scothorn* v. *Staffordshire Ry.* (1853) 8 Exch. *341; *The Martha* (D. C. 1888)

35 Fed. 313; *Cincinnati etc. R. R.* v. *Steele* (1910) 140 Ky. 383. This right, however, is subject to the qualification that it cannot be exercised so as to impose additional burdens on the carrier. It hinges on the ownership of the person seeking to countermand, and since serious consequences to the carrier result from the delivery of goods to the wrong person, *Ratzer* v. *Burlington, etc. Ry.* (1896) 64 Minn. 245, the carrier may demand a surrender of the bill of lading, or in absence thereof, satisfactory evidence of the right of ownership together with sufficient indemnity. See *Ryan* v. *Great Northern Ry.* (1903) 90 Minn. 12. Moreover, if the change is attended with additional cost to the carrier, the owner must pay, *Carr* v. *Pennsylvania R. R.* (1905) 92 N. Y. Supp. 799, and if the carrier is able and willing to transport the goods to the original destination, it is entitled to the full freight, *Violett* v. *Stettinius* (1839) 5 Cranch. C. C. 559, unless, by custom or usage, it is to be paid only for the distance the goods are actually carried. *Sharp* v. *Clark* (1896) 13 Utah 510.

Constitutional Law—Officers—Unregulated Discretion.—An ordinance made it unlawful to maintain stock pens containing more than six head of cattle within 300 feet of any hotel or private residence without a permit from the city council. *Held,* the vesting in the city council of an unregulated discretion to issue the permit was constitutional. *Ex parte Broussard* (Tex. 1914) 169 S. W. 660. See Notes, p. 63.

Constitutional Law—Police Power—Penalty.—The owner of a tenement house is by statute in New York subject to civil penalty of $50, if any part of his premises is used for the purpose of prostitution. *Held,* the legislature did not intend to hold such owner liable without notice or guilty knowledge. *Tenement House Dept.* v. *McDevitt* (N. Y. App. Div.) Not yet reported. 52 N. Y. L. J. 1015. For a discussion of this case in the lower court reaching the same result, see 14 Columbia Law Rev. 600.

Contracts—Assignability of Executory Contracts.—The owner of a hotel leased the premises and furnishings to an experienced hotel man and agreed to accept a percentage of the gross receipts as rental. *Held,* the lease was not assignable to a corporation. *Nassau Hotel Co.* v. *Barnett & Barsh Corporation* (N. Y. 1914) 162 App. Div. 381. See Notes, p. 70.

Criminal Law—Kidnapping by a Parent—Contract for Custody of Children.—A father, by contract, surrendered to his wife all his rights to the custody of their child, but later enticed the child away. *Held,* the father cannot be convicted of kidnapping. *State* v. *Powe* (Miss. 1914) 66 So. 207.

A father's common law right to the custody of his children is based on his natural duty to support and care for them, *State* v. *Baldwin* (1846) 5 N. J. Eq. 454; *Matter of Scarritt* (1882) 76 Mo. 565; see *In re Lewis* (1883) 88 N. C. 31, and since he can not free himself from his obligation, public policy forbids his transferring his legal right of custody to another, whether by gift or contract, except as the statutes provide for adoption or apprenticement. *Hernandez* v. *Thomas* (1905) 50 Fla. 522; *Brooke* v. *Logan* (1887) 112 Ind. 183; *Weir* v. *Marley* (1889) 99 Mo. 484; *Wood* v. *Shaw* (Kan. 1914) 139

Pac. 1165. Contracts awarding custody to third persons, however, have been held valid in a few jurisdictions. *Commonwealth* v. *Gilkeson* (Pa. 1851) 1 Phila. 194; *State* v. *Barrett* (1863) 45 N. H. 15; *Bedford* v. *Hamilton* (1913) 153 Ky. 429. Where custody has been granted to another, the courts frequently refuse to restore the child to the father on habeas corpus, but in such proceedings the courts are really exercising the Chancellor's supervision over infants. 14 Columbia Law Rev. 77. Their prime consideration is the child's welfare, which they often find demands the perpetuation of the bonds of affection established during the custody. *Chapsky* v. *Wood* (1881) 26 Kan. 650; *Cunningham* v. *Barnes* (1893) 37 W. Va. 746; *Legate* v. *Legate* (1894) 87 Tex. 248. If the view is accepted that a parent cannot contract to transfer the custody of his child to a third person, it is difficult to see how a father can divest himself of his legal right to his child's custody, by agreement with his wife. But see *Carpenter* v. *Carpenter* (1907) 149 Mich. 138. While the parental right of custody exists, a father's taking of his own child can hardly be within the scope of a criminal offence, although he might be guilty if he had, by court order, been lawfully divested of that right. *State* v. *Farrar* (1860) 41 N. H. 53; *In re Peck* (1903) 66 Kan. 693.

Ejectment—Right to Second Trial—Waiver by Stipulation.—In an ejectment suit it was orally stipulated in open court that tax titles to six parcels of the land in litigation were valid, while those of the other six were invalid. Upon this stipulation judgment was rendered, and the defendant took advantage of the judgment in his favor, but moved for a second trial as to the other six parcels. *Held,* the right to a second trial in ejectment was not waived. *Guaranteed Investment Co.* v. *Van Metre* (Wis. 1914) 149 N. W. 30.

Ordinarily stipulations to be binding upon the parties must be in writing. Stipulations, however, orally made in open court are enforcible, *Savage* v. *Blanchard* (1889) 148 Mass. 348; *Slaven* v. *Germain* (N. Y. 1892) 64 Hun 506, except where a statute, like the Wisconsin Statute, provides that such stipulations are not valid unless they are entered in the form of an order by consent. Circ. Ct. Rule 5, 108 N. W. x; N. Y. Gen'l Rules Practice, Rule 11. Assuming that the stipulation in the principal case was binding, although it does not appear that it was entered, the question arises whether it amounted to a waiver of the defendant's right to a second trial in ejectment. At common law a judgment in ejectment was not final, but the claimant was, as a matter of right, entitled to further suits. Warvell, Ejectments § 478. Although in a few states a judgment in such a suit has been made conclusive, N. Y. Code Civ. Proc., § 1525, in most jurisdictions the second trial, at least, is still granted as a matter of right. This right may be waived by either an express waiver, or by facts from which such waiver may be implied. *Ladd* v. *Hildebrant* (1870) 27 Wis. 135; *Roberts* v. *Baumgarten* (1891) 126 N. Y. 336. A mere stipulation of facts would manifestly not authorize any such implication, *Hewitt* v. *Wisconsin etc. Co.* (1892) 81 Wis. 546, nor would the acting upon a judgment by verdict waive the right to a second trial. *Clairview etc. Co.* v. *Hosmer* (1912) 137 N. W. 531. But where, as in the principal case, there has been a judgment upon a stipulation of facts and an action upon this judgment, it would seem that as clear a case of waiver as may possibly be shown has been made out, and the decision in the principal case would appear unsound.

EVIDENCE—CRIMINAL LAW—PRIMA FACIE CASE.—The defendant was indicted for having intoxicating liquors in his possession with intent to sell them. The statute provided that possession of a United States tax stamp should be *prima facie* evidence of guilt of the offense charged. *Held,* evidence of the possession of the tax stamp alone was insufficient to support a conviction. *Dick* v. *Commonwealth* (Ky. 1914) 169 S. W. 496.

A legislature has the power to declare that certain facts shall be *prima facie* evidence of another fact essential to conviction. 2 Chamberlayne, Evidence, § 995; *Commonwealth* v. *Rowe* (Mass. 1895) 14 Gray 47; *State* v. *Hurley* (1867) 54 Me. 562. Such a statute violates no constitutional privilege and the power of the legislature to change rules of procedure in this manner is absolute, 2 Wigmore, Evidence, § 1354, (3), although it has sometimes been urged that the fact upon which the presumption rests must be naturally related to the main fact. *State* v. *Beswick* (1883) 13 R. I. 211; see *People* v. *Cannon* (1893) 139 N. Y. 32; *cf. State* v. *Beach* (1897) 147 Ind. 74, 79. *Prima facie* evidence, in a civil case, is evidence which, if uncontroverted and unexplained, becomes conclusive, and may warrant a directed verdict in accordance. 4 Wigmore, Evidence, §§ 2494, 2495; 1 Chamberlayne, Evidence, § 399. In a criminal case, however, since a verdict can never be directed against the defendant, 4 Wigmore, Evidence, § 2495, 2(b); 1 Chamberlayne, Evidence, §§ 72, 399, the phrase merely signifies evidence sufficient to justify a verdict of guilty if the jury believes beyond a reasonable doubt that the defendant is guilty. *State* v. *Adams* (1912) 22 Ida. 485; *cf. State* v. *Intoxicating Liquors* (1888) 80 Me. 57. The decision in the principal case, although not wholly unsupported, *Sizemore* v. *Commonwealth* (1910) 140 Ky. 338, is based upon a misapprehension that any other construction of the term *"prima facie"* would imply that if the evidence were unrebutted it would become conclusive, an assumption which, of course, is not true, *State* v. *Momberg* (1905) 14 N. D. 291; *State* v. *Adams, supra,* and the decision is, therefore, against the weight of authority. *Shivers* v. *State* (1913) 7 Ala. App. 110; *Walker* v. *State* (Okla. 1912) 127 Pac. 895.

EVIDENCE—NUISANCE—EFFECT UPON OTHERS SIMILARLY SITUATED.—In an action for damages caused by smoke from the defendant's roundhouse, evidence by other residents as to the effect of the smoke in the vicinity of the plaintiff's dwelling was *held* admissible. *Soderburg* v. *Chicago St. P. M. & O. Ry.* (Iowa 1914) 149 N. W. 82.

It is generally held, in an action based upon a nuisance, that the effect of the act complained of may be shown upon other persons or property similarly situated and simultaneously affected, on the theory that it tends to prove the extent and character of the injury and also that the act complained of was the procuring cause of the injury. *Evans* v. *Keystone Gas Co.* (1895) 148 N. Y. 112; *Wylie* v. *Ellwood* (1890) 134 Ill. 281; *Hoadley* v. *Seward & Son Co.* (1899) 71 Conn. 640; *contra, Harley* v. *Merrill Brick Co.* (1891) 83 Ia. 73. Although admitting its force to show the existence of the act alleged as a nuisance, the courts deny its competency on the question of damages. *Fay* v. *Whitman* (1868) 100 Mass. 76. Some jurisdictions, however, regard such evidence as collateral and exclude it on the ground that it leads to a confusion of issues. *Clark* v. *Willet* (1868) 35 Cal. 534, 544; *Concord R. R.* v. *Greeley* (1851) 23 N. H. 237. Such evidence

can never be admitted, however, whatever the nature of the action, unless it appear that all the physical conditions were identical on each occurrence. See *Bradley* v. *Iowa Central Ry.* (1900) 111 Ia. 562. Upon the same theory the result of an experiment may be received in evidence, but the original circumstances must be reproduced in their entirety. *Seibert* v. *McManus* (1901) 104 La. 404; *Decatur etc. Co.* v. *Mehaffey* (1900) 128 Ala. 242; but see *Lake etc. R. R.* v. *Mugg* (1892) 132 Ind. 168. The results of experiments in cases of nuisance are, therefore, considered competent to weaken or strengthen the claim of the plaintiff, at any rate when used to corroborate expert testimony. *Eidt* v. *Cutter* (1879) 127 Mass. 522.

Extradition and Interstate Rendition—Quantum of Evidence for Surrender of Accused.—The petitioner, in custody for extradition to Canada, sued out a writ of habeas corpus. *Held,* since sufficient evidence was not produced to show reasonable ground to believe him guilty, he should be discharged. *Ex parte LaPage* (D. C. N. D. N. Y. 1914) 216 Fed. 256.

Interstate rendition is controlled by constitutional provision and federal statute. U. S. Const., Art. 4, § 2, (2); U. S. Rev. Stat. § 5278. The sound view imposes a duty upon the executive of the asylum State to surrender fugitives upon the mere demand by the executive of another State, properly supported by the required indictment, information or affidavit. See 10 Columbia Law Rev. 208; *Matter of Voorhees* (1867) 32 N. J. L. 141, 146; *In re Hooper* (1881) 52 Wis. 699; *Ex parte Swearingen* (1879) 13 S. C. 74. The papers filed by the demanding State and the detaining governor's warrant of arrest will be reviewed on habeas corpus proceedings to ascertain their sufficiency. 14 Columbia Law Rev. 665; *People* v. *Brady* (1874) 56 N. Y. 182; see *People* v. *Donohue* (1881) 84 N. Y. 438. Since the federal statute merely requires evidence that the accused is charged with a crime, Moore, Interstate Rendition, § 612, the question of guilt is, in the absence of a state statute, usually left wholly to the courts of the demanding State. *Matter of Clark* (N. Y. 1832) 9 Wend. 212; *In re Greenough* (1858) 31 Vt. 279; *cf.* Moore, Interstate Rendition, § 612; *Kingsbury's Case* (1870) 106 Mass. 223, 225. Although in international extradition enough evidence to convict is not necessary to deport, the treaties between the United States and foreign nations governing these proceedings usually provide for extradiction only when, according to the laws of the place where the person sought is found, his guilt is sufficiently shown to justify his commitment for trial, had the crime been committed in that place, Moore, Extradition, § 337, and this question in the United States is determined by the laws in the particular State in which he is detained. *In re Ezeta* (D. C. 1894) 62 Fed. 972, 981; *In re Farez* (1870) 7 Blatchf. 345, 357. Since the principal case involved only principles of international extradition, the application of this test by the court is clearly sound.

Husband and Wife—Husband's Liability for Wife's Torts—Alienation of Affections.—A married woman sued another woman and her husband for alienation of the affections of the plaintiff's husband by the defendant wife. *Held,* although the common law liability of the husband for his wife's torts has not been abrogated in Missouri by the Married Woman's Act, the husband is not liable here since his wife's act injures him as greatly as it does the plaintiff. *Claxton* v. *Pool* (Mo. 1914) 167 S. W. 623.

In practically all the States where legislation as to married women

has not expressly changed the common law rule of the husband's liability for the torts of his wife not connected with her separate estate, such legislation has been strictly construed as not abrogating the old rule. See Burdick, Torts (3rd ed.) 141; 12 Columbia Law Rev. 277. This is so in the jurisdiction of the principal case, where the courts have declared that the common law rule remains unchanged, and that additional legislation will be necessary to effect any such change. *Nichols* v. *Nichols* (1898) 147 Mo. 387, 407; *Taylor* v. *Pullen* (1899) 152 Mo. 434. The court admits the force of the general rule, but makes an exception on the facts of this particular case, drawing an analogy from a case in which the husband was exempted from liability for his wife's debts when she had abandoned him and was living in adultery with another man. *Atkyns* v. *Pearce* (1857) 2 C. B. [N. S.] 762. This case, however, was decided on the ground of agency, holding that the wife's authority to charge the husband's credit had been terminated, and does not at all involve the principle advanced here, that the husband is not liable where the wife, in committing the wrong for which he is sought to be held, has at the same time violated her duty to him. This limitation on the husband's liability is unsupported by precedent, and seems unwarrantable in the face of the decisions of the Supreme Court of the State. The case is now before that court on *certiorari,* and it is to be hoped that it will not sustain this exception to the common law rule.

INJUNCTIONS—CONTROL OF EQUITY OVER ELECTIONS—TAXPAYERS' ACTIONS.—A taxpayer sought to enjoin the State Board of Elections from taking steps preliminary to the nomination and election of delegates to a constitutional convention pursuant to a statute which the plaintiff alleges is unconstitutional. *Held,* the injunction will be denied. *Schieffelin* v. *Komfort* (N. Y. 1914) 106 N. E. 675.

The New York Code of Civil Procedure, § 1925, provides that "an action to obtain a judgment preventing the waste of, or injury to, the estate, funds, or other property of a county, town, city or incorporated village of the State, may be maintained against any officer thereof, * * * either by a citizen, resident therein, or by a corporation who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein." The court construes this section to limit the scope of the Taxpayers' Action to suits against municipal and not against state officers. For a discussion of the control of courts of equity over elections, see 13 Columbia Law Rev. 526. As to the inherent power of a court of equity to enjoin proceeding under an unconstitutional statute, in an action which does not involve the individual liberty or property of the plaintiff, see 14 Columbia Law Rev. 243.

INSANITY—CONVEYANCES—AVOIDANCE.—In an action of ejectment by the heirs of a grantor to recover the property, *held,* that evidence of the insanity of the grantor was inadmissible. *Walton* v. *Malcolm* (Ill. 1914) 106 N. E. 211. See Notes, p. 61.

LANDLORD AND TENANT—ENFORCEMENT OF FORFEITURE CONDITIONS IN LEASES.—A landlord expressed his election to declare a forfeiture of a lease for non-payment of rent by bringing an action to recover possession. *Held,* it was too late for the tenant to avoid the forfeiture by a tender of the accrued rent. *Matthews* v. *Crofford* (Tenn. 1914) 167 S. W. 695. See Notes, p. 58.

LIMITATION OF ACTIONS—PRESENTATION OF DEFENSE—DEMURRER.—The plaintiff's petition showed on its face that the cause of action was barred by the Statute of Limitations and failed to set forth the exception which took the case out of the operation of the statute. *Held,* a general demurrer to the petition should have been sustained. *Martin* v. *Gassert* (Okla. 1914) 139 Pac. 1141.

In actions at common law it has been the established rule that a defendant may raise the defense of the Statute of Limitations only by special plea. *Puckel* v. *Moore* (1672) 1 Ventris, 191; *Allen* v. *Word* (1845) 25 Tenn. 284. In suits in equity, on the other hand, when the bar is apparent upon the face of the complaint, it is now generally recognized that this defense may be properly interposed on demurrer. Buswell, Limitations & Adverse Possession, § 383; Story, Equity Pleading (10th ed.) §§ 484, 503 n., 751. And in most of the code States, a demurrer on this ground will be sustained in law as well as in equity, provided the defect is evident. *Hudson* v. *Wheeler* (1871) 34 Tex. 356; 13 Encyc. of Pleading & Practice, 202. Some courts allow a defendant to avail himself of this defense on a general demurrer, but they admit that it is better practice to demur specially. See *Vore* v. *Woodford* (1876) 29 Oh. St. 245; *Coney* v. *Horne* (1894) 93 Ga. 723. In cases where the right of action is not of common law origin, but is granted by a statute which prescribes a period of time within which the right may be enforced, such time limit is not a true Statute of Limitations but rather a condition precedent, and a complaint which shows on its face that this limit expired before the commencement of the action is properly demurrable. *Lambert* v. *Ensign Mfg. Co.* (1896) 42 W. Va. 813; see *The Harrisburg* (1886) 119 U. S. 199, 214. But in all cases actually involving the Statute of Limitations, it is submitted that the New York rule, requiring that the Statute be pleaded specially by way of answer, is the most satisfactory. N. Y. Code Civ. Proc., § 413; see *Green* v. *Hauser* (N. Y. 1890) 18 Civ. Pro. Rep. 354, 360. It seems unjust, at least in actions at law, to permit a defendant to establish this defense on demurrer, since the plaintiff is thereby deprived of his right to reply, and is forced to include in the complaint facts which properly constitute the matter of a replication. See Langdell, Equity Pleading, § 119.

MARRIAGE—ANNULMENT—ALIMONY PENDENTE LITE.—In a suit by a husband to have a marriage annulled, the trial court granted a motion for alimony *pendente lite. Held,* the right to alimony *pendente lite* is solely statutory, and since not authorized by any provision of the statutes cannot be granted. *Taylor* v. *Taylor* (Ore. 1914) 140 Pac. 999.

The ecclesiastical courts of England required a husband to provide for the separate maintenance of his wife during the pendency of a litigation between them because he was bound by the common law to support her. *Bird* v. *Bird* (1753) 1 Lee 209; *id.* 572. This temporary alimony was granted as a necessary incident to the hearing of the cause, *Amos* v. *Amos* (1842) 4 N. J. Eq. 171; *Goldsmith* v. *Goldsmith* (1859) 6 Mich. 285, and so it has usually been held that statutes giving the courts of this country jurisdiction over such suits gave them by necessary implication the right to decree such alimony as indispensible to the proper exercise of their jurisdiction. *McGee* v. *McGee* (1851) 10 Ga. 477; *Petrie* v. *People* (1866) 40 Ill. 334; *Higgins* v. *Sharp* (1900) 164 N. Y. 4. In some few instances, however, the

statutes were construed as enabling the courts to act only as they specifically directed. *Shannon* v. *Shannon* (Mass. 1854) 2 Gray 285; *Wilson* v. *Wilson* (1837) 19 N. C. 377. Having the power to award alimony *pendente lite*, the courts have always exercised it in divorce suits whether the wife was plaintiff or defendant, *Story* v. *Story* (Mich. 1844) Walk. 421, and in annulment proceedings when she was defendant. *North* v. *North* (N. Y. 1845) 1 Barb. Ch. 241. It is, however, denied when she herself seeks to have the marriage declared void, because her allegations are said to negative the duty of support and should be taken as true against herself. *Jones* v. *Brinsmade* (1905) 183 N. Y. 258. This view overlooks the fact that marriage is a status and that the right to temporary support has always been based upon the *de facto* existence of that status, *Bird* v. *Bird, supra; Vroom* v. *Marsh* (1878) 29 N. J. Eq. 15, irrespective of the fact that it may be shown by the final decision not to have been *de jure*. See *Brinkley* v. *Brinkley* (1872) 50 N. Y. 184; *Lea* v. *Lea* (1889) 104 N. C. 603. In the principal case, however, the wife was the defendant, so both upon its general theory and its special facts the decision is opposed to reason and authority.

Master and Servant—Torts—Liability for Acts of Special Policeman.—A policeman of the City of Savannah, appointed at the request of the defendant and paid by it, while on duty to preserve order in the defendant's depot, killed the plaintiff's husband. *Held*, in the absence of proof that the policeman was subject to its orders, the defendant corporation is not liable for his torts. *Pounds* v. *Central of Georgia Ry. Co.* (Ga. 1914) 83 S. E. 96.

Where an officer, employed to keep order on the defendant's premises, is directly under the control and orders of the defendant, the ordinary principles of agency apply and the defendant is liable if the act was within the scope of the policeman's authority as the defendant's servant. *Taylor* v. *New York etc. R. R.* (1910) 80 N. J. L. 282; *Illinois Steel Co.* v. *Novak* (1899) 84 Ill. App. 641, affd. 184 Ill. 501; *cf. Sharp* v. *Erie R. R.* (1906) 184 N. Y. 100. But where the officer is under the exclusive orders and control of the public police authorities, the defendant is not liable, and the mere fact that the defendant secured his appointment as a policeman and paid his wages does not make him the defendant's servant. *Healey* v. *Lothrop* (1898) 171 Mass. 263. Even though the officer be the defendant's servant, the latter is not liable for acts done by him as a public officer, and not in furtherance of the defendant's interests, *Tyson* v. *Bauland Co.* (1906) 186 N. Y. 397; *Philadelphia etc. R. R.* v. *Stump* (1910) 112 Md. 571, or for acts done wantonly for the officer's own purposes. *Pennsylvania R. R.* v. *Kelly* (C. C. A. 1910) 177 Fed. 189; *cf. McKain* v. *Baltimore & O. R. R.* (1909) 65 W. Va. 233. It is ordinarily for the jury to decide whether the tort was within the scope of the officer's employment as the defendant's servant, or whether it was committed in his character of police officer. *Hirst* v. *Fitchburg etc. Ry.* (1907) 196 Mass. 353; *Sharp* v. *Erie R. R., supra; Taylor* v. *New York etc. R. R., supra.* The principal case is supported alike by authority and principle in its decision that where the defendant has no control over the officer it is not liable for his torts. *Healey* v. *Lothrop, supra.*

Negligence—Liability of Retired Partner—Injury to Invitée.—A retired partner, without giving notice of his withdrawal, permitted the

business to continue under the old firm name. The plaintiff, subsequent to the dissolution, was injured through the negligence of a firm servant. *Held,* two judges dissenting, aside from principles of partnership, the retired partner is liable on the ground of implied invitation. *Jewison* v. *Dieudonne* (Minn. 1914) 149 N. W. 20.

A person holding himself out as a partner, when his representations are acted upon, is estopped to deny his liability on firm contracts. Burdick, Partnership (2nd ed.) 67 *et seq.* Accordingly a retiring partner, when he permits continued use of the old firm name, represents that the old business continues, and since it is presumed that credit is extended on the faith of his name, he is held to the liability of a true partner, *Thayer* v. *Goss* (1895) 91 Wis. 90, unless notice of his withdrawal has been given. *In re Fraser* L. R. [1892] 2 Q. B. 633. These principles, however, can be applied only when reliance upon his representation has been the cause of the injury. *Thompson* v. *First National Bank* (1884) 111 U. S. 529. But when it is the tort of a firm servant which has caused the harm, the plaintiff's loss cannot be attributed to the holding out partner, and the latter is relieved from responsibility. Pollock, Digest of Partnership, 59. The decision in the principal case seems to be based upon the theory of invitation. But by this doctrine, the duty of reasonable care is imposed upon an owner or occupant who by his negligent conduct has reasonably induced the user of his premises which resulted in the plaintiff's injury. *Furey* v. *New York Cent. etc. R. R.* (1902) 67 N. J. L. 270. In the principal case, however, the retired partner was not in possession or control of the premises, and could be subjected to the liability of an inviter only on the ground that he was a partner. And since there was neither reliance upon his conduct, nor, as to the accident, any holding out of partnership, the majority opinion would seem unsupportable.

Negotiable Instruments—Fraud in Inception—Estoppel.—The plaintiff's signature to a promissory note was obtained by misrepresentation as to the character of the instrument. Though he had ample opportunity to do so, he failed to read it. *Held,* his lack of intention to execute a promissory note was, under the circumstances, no defense against a *bona fide* holder, since where one of two innocent persons must suffer by the fraud of a third, the loss should fall upon him who, by reposing confidence in that third, rendered possible the infliction of the injury. *Munnich* v. *Jaffe* (1914) 149 N. Y. Supp. 338.

The general rule of negotiable instruments that an indorsee for value before maturity and without notice takes free from all equities and defenses between the original parties presupposes the existence of an actual contract in the instrument to be negotiated. *DeCamp* v. *Hamma* (1876) 29 Oh. St. 467; *Walker* v. *Ebert* (1871) 29 Wis. 194. Therefore if it be shown that the promise sued upon was never in fact made, the paper is a legal nullity, and there is no basis for the application of the rule which acts to enforce and not to create obligations. *Foster* v. *MacKinnon* (1869) L. R. 4 C. P. 704. But where the defendant's signature to the instrument was obtained through his own negligence the courts have generally declared that it is better for him to suffer from the fraud which his carelessness renders possible, than that the character of commercial paper should be impaired to the injury of innocent parties. *Douglass* v. *Matting* (1870) 29 Ia. 498; *Chapman* v. *Rose* (1874) 56 N. Y. 137. It is, moreover, now agreed

that failure to read the instrument signed by one having opportunity and ability so to do is sufficient negligence to render him liable as matter of law. 1 Daniel, Negotiable Instruments, § 850; *Ruddell* v. *Dillman* (1881) 73 Ind. 518; see *Van Slyck* v. *Rooks* (Mich. 1914) 147 N. W. 579; *Ort* v. *Fowler* (1884) 31 Kan. 478. It is not necessary, however, to invoke this broad maxim of public policy, since the negligence of the defendants in every instance resulted in the making of a false representation and as an innocent party acted upon it, clearly gave rise to an estoppel. The decisions should be supported upon this truly legal doctrine of estoppel by which the same desired result may be reached. *McCoy* v. *Gouvion's Executrix* (1897) 102 Ky. 386; *Bank* v. *Smith* (1875) 55 N. H. 593. *Foster* v. *MacKinnon, supra.*

Officers—Highway Officers—Liability for Negligence.—The defendants, township highway officers, negligently left a ditch across the road exposed over-night without lights, guards or warnings of any kind, whereby the plaintiff, traveling along the highway, was injured. *Held,* although no liability attached to the town of which they were officers, the defendants themselves were personally liable. *Tholkes* v. *Decock* (1914) 125 Minn. 507.

In the absence of statute, counties and unincorporated towns, considered as political subdivisions of the State, are almost universally held not liable for their negligence or that of their officers. 4 Dillon, Municipal Corporations (5th ed.) § 1688. It is difficult to see, however, how this exemption should in any way affect the liability of an officer of the town for his own negligence, as was urged by the respondent in the principal case. To deny the personal liability of the officer would be to deny any remedy for the wrong suffered by the plaintiff. The general rule is that public officers, though not liable for acts which are judicial in their nature, *Smith* v. *Gould* (1884) 61 Wis. 31; see 14 Columbia Law Rev. 599, are liable for injuries resulting from the negligent performance of purely ministerial duties. Mechem, Public Officers, § 664; *Bennett* v. *Whitney* (1884) 94 N. Y. 302. This liability arises out of the legal duty owed to the public not to discharge the duties of their offices in a negligent manner, and is analogous to the liability of a street contractor to individuals for his negligence, which exists independent of his contract with the town. *McMahon* v. *Second Ave. Ry.* (N. Y. 1877) 11 Hun 347; *Solberg* v. *Schlosser* (1910) 20 N. Dak. 307; but see *Schneider* v. *Cahill* (Ky. 1910) 127 S. W. 143. There would seem to be, therefore, no reason why an exception to the general rule should be made in the case of a town officer because the town employing him is not liable, and this view is sustained by the weight of authority. *Piercy* v. *Averill* (N. Y. 1885) 37 Hun 360; *Robinson* v. *Rohr* (1889) 73 Wis. 436; *Doeg* v. *Cook* (1899) 120 Cal. 213; *contra, Hardwick* v. *Franklin* (1905) 120 Ky. 78. Since the officers in the principal case were engaged in a ministerial duty in repairing the road, see *McCord* v. *High* (1868) 24 Ia. 336; *Tearney* v. *Smith* (1877) 86 Ill. 391, the decision in the principal case seems to be perfectly sound.

Officers—Removal—Procedure.—In proceedings before the City Council leading to the removal of the tax commissioner, the accused was not permitted to be represented by counsel. *Held,* failure to grant this right constituted reversible error. *State ex rel. Arnold* v. *City of Milwaukee* (Wis. 1914) 147 N. W. 50. See Notes, p. 66.

Officers—Salary—Increase During Term.—The State sued to recover an excess in salary, paid to the State Health Officer, due to an increase therein during his term of office. *Held,* since he was employed by and his duties were regulated by the State Board of Health, he was not a state officer within the meaning of § 281 of the Alabama Constitution, which provides that the salary of any officer holding a civil office of profit under the State, county or municipality shall not be increased or diminished during the term for which he shall have been elected or appointed. *State* v. *Sanders* (Ala. 1914) 65 So. 378.

When an office is created by the legislature, and its duties determined by law, the occupant of the office is a public officer, *State* v. *Massillon* (1902) 24 Ohio C. C. 249, to whom has been delegated a part of the sovereignty of the State, *State* v. *Spaulding* (1897) 102 Ia. 639, and he is therefore an agent of the State. See *Clark* v. *Stanley* (1872) 66 N. C. 59; *Henley* v. *Mayor of Lyme* (1828) 5 Bing. 91. But if the duties are determined, not by law, but by contract or by a board, the position of the officer appears to be that of an employee of the board. *State* v. *Massillon, supra,* p. 253. In such a case the delegation of sovereignty is not to the officer but to the board which creates him and whose servant he is, *School Commrs.* v. *Goldsborough* (1899) 90 Md. 193; *Cramer* v. *Water Commrs.* (1895) 57 N. J. L. 478, and the board may remove him at pleasure, which could not be done if he were a public officer. *State* v. *Johnson* (1894) 123 Mo. 43; *State* v. *Massillon, supra.* The state health officer in the principal case is, therefore, not a "state officer" within the meaning of § 281. Another objection to the suit arises from the fact that as the health officer holds at the pleasure of the board he has no term of office, *i. e.,* there is no limit fixed by law, and the increase, therefore, is not during his term. *State* v. *Massillon, supra.* If there is no constitutional limitation, *Givens* v. *Daviess Co.* (1891) 107 Mo. 603, or if the limitation does not apply, there is, of course, no objection to an increase or diminution of salary by the power which created the office. *Loving* v. *Auditor of Public Accounts* (1882) 76 Va. 942.

Pleading and Practice—Judgment on Pleadings After Demurrer—New York Code of Civil Procedure.—After demurrer to a complaint, the plaintiff moved for judgment on the pleadings under § 547. The demurrer was shown to be sufficient. *Held,* since the defendant failed to make a similar motion, the court should have confined itself to a simple denial of the plaintiff's motion. *Bacharach* v. *American Union Realty Co.* (N. Y. App. Div., 1st Dept. 1914) 163 App. Div. 940.

Under the Code the sufficiency of a demurrer may now be tested by several methods, including a motion for judgment on the pleadings under § 547. *National Park Bank* v. *Billings* (1911) 203 N. Y. 556; see *Kramer* v. *Barth* (N. Y. 1913) 79 Misc. 80. A successful motion on the pleadings by either party should terminate the action, whether or not the adverse party also moves for judgment. *Cf. National Park Bank* v. *Billings* (N. Y. 1911) 144 App. Div. 536. Even if the defendant fails to make such motion, judgment should be rendered for him upon his demurrer if the plaintiff's motion is denied, since the demurrer admits the facts and the complaint based upon these facts has been declared insufficient. Before the adoption of § 547 in 1908, the only means of testing a demurrer was the formal and cumbersome method of trial provided by §§ 963, 965 and 977. See *Kramer* v. *Barth, supra.* In spite of the evident intention manifested in § 547 to simplify

pleadings, the First Department of the Appellate Division in 1910 decided that a demurrer could be tested only by setting it down for trial. *Ventriniglia* v. *Eichler* (N. Y. 1910) 138 App. Div. 274. Although the Second Department has since qualified this doctrine, *Schwartz* v. *Williams* (N. Y. 1912) 153 App. Div. 302, and although the Court of Appeals has decided that a demurrer may be tested by a motion on the pleadings, *National Park Bank* v. *Billings* (1911) 203 N. Y. 556, the principal case bases its decision on *Ventriniglia* v. *Eichler, supra.* In view of the sympathetic support afforded by the First Department to other recent legislation simplifying pleadings, the principal case seems unfortunately conservative. *Cf. Chapman* v. *Read Co.* (N. Y. 1911) 73 Misc. 401, (1912) 149 App. Div. 52.

Pleading—Service by Publication—Subject of the Action.—In an action seeking a money judgment against the defendant, the plaintiff sued out an attachment against the defendant's property, and then procured an order for publication under the Code Civ. Proc. § 112, providing for such service when the defendant "is not a resident of the State or has property therein and the court has jurisdiction of the subject of the action". *Held,* since "subject of the action" refers merely to the cause of action of which the court had jurisdiction the service is valid although no property of the defendant had been attached. *South Dakota Commercial Assn.* v. *Ramsey* (S. Dak. 1914) 147 N. W. 75.

While the New York Code of Civil Procedure, § 439, provides merely that a sufficient cause of action be alleged to secure an order by service for publication, the courts have imported into this section the requirements of the old Code of Procedure, § 138, similar to that governing the principal case and now require that the cause of action arise within the State, or that the defendant have property within the State and the court have jurisdiction of the subject of the action. *Bryan* v. *University Pub. Co.* (1889) 112 N. Y. 382; *VanMater* v. *Post* (N. Y. 1911) 147 App. Div. 111. Generally where the action is one to procure a judgment for money only, the judgment is invalid unless the property of the defendant has been attached before judgment is entered, see *Pennoyer* v. *Neff* (1877) 95 U. S. 714, but it seems that the courts as a corollary to the rule stated above have required, even before granting an order for publication, that the property of the defendant has been attached within the State in a case where the cause of action arose without the State, *Rutkosky* v. *Public Service Ry.* (N. Y. 1913) 155 App. Div. 631; see *Bryan* v. *University Pub. Co., supra,* while if, on the other hand, the cause of action arose within the State no property need first be attached. See *Haase* v. *Michigan etc. Co.* (N. Y. 1911) 148 App. Div. 298. The confusion that can but result from this unsound distinction is strengthened by the interpretations put on the requirement that the court have jurisdiction of the "subject of the action". While its meaning should be limited to the sum of all the issues to be determined on the trial, see Pomeroy, Code Remedies (3rd ed.) § 490, some courts have construed it to mean the subject matter or property affected by the action. See *McKinney* v. *Collins* (1882) 88 N. Y. 216; *Bryan* v. *University Pub. Co., supra.* Other jurisdictions, as in the principal case, identify it with the "cause of action", *Hartzell* v. *Vigen* (1896) 6 N. Dak. 117, and therefore hold that if jurisdictional facts exist no property need be attached to secure the order for publication.

QUASI-CONTRACTS—FEES EXACTED UNDER UNCONSTITUTIONAL STATUTE—RECOVERY.—The plaintiff's assignor paid fees for the probate of his testator's will, exacted under an unconstitutional statute. *Held,* the payment was compulsory, and may be recovered, though made without protest. *Diocese of Fargo* v. *Cass County* (N. Dak. 1914) 148 N. W. 541.

Although it is well settled in most jurisdictions that voluntary payments, such as taxes, or fees, made under a mistake of law cannot be recovered, *Sonoma County Tax Case* (C. C. 1882) 13 Fed. 789; *Benson* v. *Monroe* (1851) 61 Mass. 125; *Railroad* v. *Commissioners* (1878) 98 U. S. 541, the rule does not apply to payments made under duress, *e. g.,* to prevent arrest of person, seizure and immediate sale of property, or the loss of some present right. 7 Columbia Law Rev. 601. Where such duress is lacking, because the plaintiff might without present loss, have availed himself of his legal remedy by way of mandamus or otherwise, instead of paying the unlawful assessment, the strict rule denies a recovery under circumstances similar to those of the principal case. *De Graff* v. *County of Ramsey* (1891) 46 Minn. 319. There is, however, some recent authority for holding such a payment involuntary. *Trower* v. *San Francisco* (1907) 152 Cal. 479; see *Lewis* v. *San Francisco* (1905) 2 Cal. App. 112. Since there is every presumption in favor of the constitutionality of the statute, *Salisbury etc. Co.* v. *Commonwealth* (1913) 215 Mass. 371, it seems that in the interests of justice those paying, even without protest, fees required by legislative enactment, should be allowed to recover them on the statute being adjudged unconstitutional, since such payments are practically compulsory when an officer declines to act without them. See *Trower* v. *San Francisco, supra; Lewis* v. *San Francisco, supra.* Public policy is certainly better served by the quiet collection of all payments imposed by the legislature, induced by the knowledge that they can be recovered if unconstitutionally exacted, than by compelling those assessed to test the validity of the statute by mandamus proceedings before paying the levy.

REAL PROPERTY—COVENANTS RUNNING WITH THE LAND AT LAW.—A covenant by the vendee of mining property, his heirs, administrators and assigns, to pay the vendor a certain percentage of the yearly profits was *held* to be personal to the vendor and not to bind purchasers of the land from his assignee in bankruptcy. *Consolidated Arizona Smelting Co.* v. *Hinchman* (C. C. A. 1914) 212 Fed. 813.

The plaintiff's ancestor granted a right of way across his property to a railroad corporation, which covenanted to erect and maintain a flag station thereon. In a suit against the assignee of the covenantor, it was *held* that the defendant company should continue to maintain the flag station if the public interests were not injuriously affected. *Parrott* v. *Atlantic & N. C. R. R.* (N. C. 1914) 81 S. E. 348. See Notes, p. 55.

REAL PROPERTY—LEASES OF AGRICULTURAL LANDS—RENT.—S leased his farm for 25 years to the plaintiff, in consideration of the latter's promise to support and maintain him for life. *Held,* the agreement was not within Art. 1, § 13 of the New York Constitution, which declares that "no lease or grant of agricultural land for a longer period than twelve years, hereafter made, in which shall be reserved any rent or service of any kind, shall be valid." *Parmely* v. *Showdy* (N. Y. 1914) 86 Misc. 634.

At common law the tenant who held his land by rent service was required to render to his lord a definite pecuniary rent, or a certain amount of the products of his land, or, in addition to either of these, such personal services as ploughing. 1 Co. Litt. § 213. This service must always be certain, and periodical, 2 Bl. Comm. *41, 42; *Stephens* v. *Reynolds* (1852) 6 N. Y. 455, and capable of being the subject of distraint by the lord. 1 Co. Litt. *213; 3 Kent. Comm. *460. Being an incident of tenure in common socage, it was not abolished in 1787 by the New York Statute modeled on the Statute of Quia Emptores, (Laws of 1787, *c.* 36) and, where land is not held allodially, still continues to exist, except as limited by the Constitution of 1846. *Cornell* v. *Lamb* (N. Y. 1824) 2 Cow. 652, 659. This was the "service" which was prohibited in leases of agricultural lands by Art. 1, § 13 of the New York Constitution. Clearly the consideration in the principal case was not a reservation within the definition of the constitution, for it was neither certain, nor periodical, nor capable of being the subject of distraint. *Stephens* v. *Reynolds, supra; Parsell* v. *Stryker* (1869) 41 N. Y. 480. Nor is it within the broader definition of rent because it is not "a certain profit," nor does it "issue yearly out of lands and tenements corporeal." 1 Co. Litt. § 213; see *Thorn* v. *De Breteuil* (N. Y. 1903) 86 App. Div. 405, 415. The agreement, therefore, is clearly not within Art. 1, § 13 of the New York Constitution.

STATUTES—FEDERAL EMPLOYERS' LIABILITY ACT—BENEFICIARIES DETERMINABLE UNDER LOCAL LAW.—An action for wrongful death under the Federal Employers' Liability Act, was brought by the administrator of a bastard child. A North Carolina Statute provided that illegitimate children should be considered legitimate for purposes of descent and distribution. *Held,* the local statute rendered his legitimate brothers and sister "next of kin" within the meaning of the Employers' Liability Act. *Kenney* v. *Seaboard Air Line Ry.* (N. C. 1914) 82 S. E. 968.

At common law an illegitimate child was *filius nullius,* and was considered as having no kindred. Legitimacy for purposes of inheritance, however, is often conferred by statute, and the tendency has been to construe such statutes liberally, so as to allow recovery under wrongful death statutes. See 6 Columbia Law Rev. 63. It would seem, however, that the Employers' Liability Act should not be extended by resorting to these State statutes, *cf. Michigan Cent. R. R.* v. *Vreeland* (1913) 227 U. S. 59, for the common law is the true guide in construing the laws of Congress. See *Rice* v. *Railroad* (1861) 66 U. S. 358, 374. Moreover since corporations engaged in interstate commerce are held to their common law obligations, *W. U. Tel. Co.* v. *Call Pub. Co.* (1901) 181 U. S. 92; *Pennsylvania R. R.* v. *Hummel* (C. C. A. 1909) 167 Fed. 89, they should not be denied the benefits of the common law in an action dependent upon an act of Congress, unless such benefits are expressly abrogated by Congress. *Gamble-Robinson etc. Co.* v. *Chicago etc. Ry.* (C. C. A. 1909) 168 Fed. 161. Moreover, a federal statute should not be confused by reading into it local law. See *Reynold* v. *New York Trust Co.* (C. C. A. 1911) 188 Fed. 611, 616. It should be observed that if the phrase "next of kin" is to be defined in the light of local law, the carrier's liability under the act may be limited or extended according to the will of the local legislature, and it is therefore more reasonable to suppose, since there is no express language to the contrary, and since recovery under the

Act is limited to those specifically named therein, and is not for the benefit of the estate, that the intention of Congress was that "next of kin" be understood in its usual and common law significance, so fixing beyond question the extent of the liability imposed. *Cf. Gamble-Robinson etc. Co.* v. *Chicago etc. Ry., supra; Gulf etc. Ry.* v. *McGinnis* (1913) 228 U. S. 173; *Thomas* v. *Chicago etc. Ry.* (D. C. 1913) 202 Fed. 766.

Taxation—Exemption—Public Property.—Land in Louisiana was devised to the city of Baltimore in fee, the income to be applied for the purpose of educating the poor in that city. *Semble,* such property is not taxable in Louisiana. *City of New Orleans* v. *Salmen Brick & Lumber Co.* (La. 1914) 66 So. 237.

Property belonging to the State or to one of its municipalities, and used in the exercise of a governmental function, is ordinarily exempt from taxation, either expressly, by constitution or statute, or by necessary implication. 1 Cooley, Taxation (3rd ed.) 263 *et seq.;* 4 Dillon, Municipal Corporations (5th ed.) § 1396. When this is the rule of the jurisdiction, it is applied, almost without exception, to the public property of one municipality located within another municipality of the same State. *People* v. *Board of Assessors* (1888) 111 N. Y. 505; *West Hartford* v. *Commissioners* (1877) 44 Conn. 360; *cf. Milford Water Co.* v. *Hopkinton* (1906) 192 Mass. 491; but see *Newport* v. *Unity* (1896) 68 N. H. 587. Whether, in the absence of statute, this rule should also be applied to the public property of one State or of a municipality of a State, when located within another State, is open to question. There seems to be a tendency to deny the right to such exemption. See *State* v. *Holcomb* (1911) 85 Kan. 178; *Susquehanna Canal Co.* v. *Commonwealth* (1872) 72 Pa. 72; but see *Stoutz* v. *Brown* (1879) 5 Dill. 445. Certainly, the reason that taxation of such property would defeat its own ends, upon which the implication of exemption is usually based, 1 Cooley, Taxation (3rd ed.) 263, does not apply in this case. Such exemption, however, might well be justified on principles of comity between the States, and by analogy to the application of the general rule to municipalities of the same State, since a different political subdivision would there receive the benefit of the taxation. It would seem that the land in the principal case was public property, for although it was not actually occupied for public school purposes, the income was to be devoted to a specific public purpose. *Cf. Burr* v. *Boston* (1911) 208 Mass. 537; see *Trustees* v. *City Council* (1892) 90 Ga. 634.

Torts—False Imprisonment—Detention of Delinquent Child.—The defendant police officers took the plaintiff to the juvenile detention rooms, where she was held as a juvenile delinquent for 48 hours, without the issue of any legal process. *Held,* the defendants are liable for false imprisonment. *Weber* v. *Doust* (Wash. 1914) 143 Pac. 148.

The constitutional guaranties of freedom from imprisonment except by due process of law do not prevent the legislature from prescribing a mode of procedure for the commitment of delinquent or neglected children to State Institutions, *County of McLean* v. *Humphreys* (1882) 104 Ill. 378; *Milwaukee Industrial School* v. *Supervisors* (1876) 40 Wis. 328; *Ex parte Crouse* (Pa. 1839) 4 Whart. 9, which are not prisons for the punishment of criminals, but establishments for the protection of the unfortunate. *Petition of Ferrier* (1882) 103 Ill.

367; *Ex parte Crouse, supra; Wisconsin Industrial School* v. *Clark County* (1899) 103 Wis. 651. Prior to such commitment, however, a hearing must be permitted before some competent judge or tribunal. *State* v. *Ray* (1885) 63 N. H. 406; *cf. Allgor* v. *N. J. State Hospital* (1912) 80 N. J. Eq. 386. In the jurisdiction of the principal case a summons must be issued authorizing the arrest of the child pending such a hearing, Rem. & Bal. Code, § 1991, and since this procedure was not followed by the defendants, it seems plain that they are rightly held answerable for false imprisonment, which consists of any unlawful restraint, upon one's liberty, 2 Kent, Comm. *26; 14 Columbia Law Rev. 537; *Gold* v. *Bissell* (N. Y. 1828) 1 Wend. 210; *Goodell* v. *Tower* (1904) 77 Vt. 61, and for which a public officer, and even a judge, is liable if acting without jurisdiction or under process void on its face. *Goodell* v. *Tower, supra; Stephens* v. *Wilson* (1903) 115 Ky. 27. Since malice is not necessary to the tort of false imprisonment, *East* v. *Brooklyn, etc. R. R.* (N. Y. 1906) 115 App. Div. 683; Burdick, Torts (3rd ed.) § 278, and since the legislature did not provide for summary arrest even in cases of exigency, the fact that the officers, without legal process, arrested the defendant for her own benefit was rightly disregarded in the principal case, and the allowance of substantial damages seems correct.

Transfer Tax—Devise to Benevolent Corporation.—A bequest to a corporation founded for the benefit of the employees of a certain company, though not a gift for charitable purposes, was nevertheless *held* exempt from taxation as a devise to a benevolent corporation. *Matter of Altman* (1914) 149 N. Y. Supp. 601.

An exception to the rule requiring certainty as to the beneficiaries of a trust, is very generally made in favor of charitable trusts. To bring a trust within the exception its purposes must amount to a public charity, in the sense that the class of persons who are to benefit by it must be indefinite. So where a definite body of individuals, ascertained or ascertainable, is designated by the terms of a gift to receive its benefits, it is not a gift to charity. *Old South Society* v. *Crocker* (1875) 119 Mass. 1, 22; see 3 Columbia Law Rev. 269. In the cases dealing with the doctrine of charitable trusts there is a well established distinction between "charity" and "benevolence", and it is held that bequests for solely benevolent purposes do not come within the exception, since "benevolence" is not necessarily limited to "charity" in the legal sense, but might include mere private generosities. *Morice* v. *Bishop of Durham* (1805) 10 Ves. Jr. 521; *James* v. *Allen* (1817) 3 Meriv. 17; *Chamberlain* v. *Stearns* (1873) 111 Mass. 267. In cases where it might seem that the term "benevolence" could have been deemed limited by other words in the bequest pointing to purposes strictly charitable, the courts have refused so to consider it, holding the gift invalid as a charitable trust since it need not necessarily have been applied to charity. *Williams* v. *Kershaw* (1835) 5 L. J. Ch. [N. S.] 84; *Norris* v. *Thomson's Exrs.* (1868) 19 N. J. Eq. 307, affd. 20 N. J. Eq. 489; *contra, Saltonstall* v. *Sanders* (1865) 93 Mass. 446, 465; but see *Matter of Cunningham* (N. Y. 1912) 76 Misc. 120. Although it has been held in New York that as regards the doctrine of charitable trusts the distinction between "benevolence" and "charity" has been abolished by Real Property Law, § 113; see 12 Columbia Law Rev. 356, nevertheless the New York courts recognize the common law distinction, see *Matter of Cunningham, supra,* and the principal case indicates that the terms as used in the Transfer Tax Law are not synonymous.

TRANSFER TAX—GIFTS—INTEREST OF THE SURVIVOR OF A JOINT TENANCY. —A, the owner of certain shares of stock, had the certificate issued to himself and B "and the survivor", reserving the right to annul B's interest therein. By virtue of certain agreements between A and the company, made shortly before and after the transfer of the joint interest to B, A was to receive the entire net income of the company for life. The transfer was made without consideration. On the death of A, his interest accrued to B as survivor. *Held,* the entire property passing to B was taxable. *Matter of Dana* (N. Y. 1914). Not yet reported. 52 N. Y. L. J. 251.

Since the transfer tax statute does not contemplate a transfer of property made for a valuable consideration, the interest accruing to the survivor of a joint tenancy arising out of such a transfer is not subject to the tax. *In re Heiser* (N. Y. 1913) 85 Misc. 271. And since the tax is not imposed upon a transfer by a *bona fide* gift *inter vivos,* not made in contemplation of death, *Matter of Spaulding* (N. Y. 1900) 49 App. Div. 541, affd. 163 N. Y. 606; see *Matter of Hess* (1906) 110 App. Div. 476, it would seem that where a joint tenancy has its inception in such a gift, and the donee's interest is intended to, and does take effect immediately, no tax should be imposed upon the right of survivorship, as this is merely an incident of the legal interest presently enjoyed. *Matter of Stebbins* (N. Y. 1907) 52 Misc. 438; *cf. Kelley* v. *Beers* (1909) 194 N. Y. 49. The courts, however, generally hold the interest passing to the survivor subject to the tax, as a gift intended to take effect at the death of the donor. *In re Bernuth's Estate* (1913) 143 N. Y. Supp. 672; *Matter of Durfee* (N. Y. 1913) 79 Misc. 655; *contra, Matter of Stebbins, supra.* There is, however, a well established qualification of the rule as to gifts *inter vivos,* deemed necessary to prevent an evasion of the law, that although there be a transfer complete on its face, if the donor, either directly or by collateral agreement, reserves rights inconsistent with the complete ownership and enjoyment of the gift by the donee, it is within the statute. *Matter of Brandreth* (1902) 169 N. Y. 437; *Matter of Cornell* (1902) 170 N. Y. 423; McElroy, Transfer Tax Law (2nd ed.) § 172. The circumstances of the principal case bring it within this qualification, and the holding is therefore justifiable, whether or not in all cases of gifts of joint interests in property, the right of survivorship should be taxable.

WATERS AND WATERCOURSES—CONTROL OF NAVIGABLE STREAM.—The State granted to the plaintiff the soil under the St. Lawrence River for the purpose of using the water to develop electrical energy, with the right to erect locks, dams, and bridges, on condition that "navigation shall be preserved in as good condition as, if not better than" at the time of the grant, and on the further condition that Congress authorize the undertaking. The plaintiff sues to compel the State Treasurer to accept $25,000, as a payment due under the law incorporating the plaintiff. Before appeal the incorporating statute was repealed. *Held,* one judge dissenting, that the act incorporating the plaintiff was unconstitutional, vesting no power in it to enforce any act thereunder. *Long Sault Development Co.* v. *Kennedy* (N. Y. 1914) 105 N. E. 849. See Notes, p. 68.

WATERS AND WATER COURSES—DRAINAGE OF SURFACE WATERS—INCREASE AND ACCELERATION.—The defendant by means of tiles increased and

accelerated the natural flow of surface water from his land through a depression crossing the land of the plaintiff. *Held,* since it did not appear that the plaintiff had suffered any substantial damage, an injunction would not issue. *Miller* v. *Hester* (Ia. 1914) 149 N. W. 93.

At common law the upper tenant may, in the course of building or grading, cast surface water on the lower tenant's land, and any damage resulting is *damnum absque injuria, Gannon* v. *Hargadon* (1865) 92 Mass. 106, and the lower tenant may protect himself by dams and dikes. See *Sullivan* v. *Browning* (1904) 67 N. J. Eq. 391. The upper tenant, however, may not collect surface water and empty it in volume on the lower tenant's land, *Brandenberg* v. *Ziegler* (1901) 62 S. C. 18, and since such a use is adverse the upper tenant may thereby acquire an easement after the statutory period. *White* v. *Chapin* (1866) 94 Mass. 516. Ordinarily, in the absence of some adverse use, the common law recognizes no easement or servitude upon the servient estate. *Rathke* v. *Gardner* (1883) 134 Mass. 14. On the other hand, since the civil law recognizes the right of the upper tenant to have the normal drainage conditions continued and the duty of the lower tenant to receive the normal flow in the normal manner, see *Matteson* v. *Tucker* (1906) 130 Ia. 511, the civil law seems to be better suited to the needs of agricultural communities, and it has, therefore, been generally adopted. *Obe* v. *Pattat* (1911) 151 Ia. 723; see *Ready* v. *Missouri Pac. Ry.* (1902) 98 Mo. App. 467; *Wood* v. *Moulton* (1905) 146 Cal. 317. Under this rule, however, it is generally held that the upper tenant may accelerate and increase the flow in any depression through which water naturally drains, *Fenton etc. R. R.* v. *Adams* (1906) 221 Ill. 201, unless the change is so great as to cause substantial damage to the servient estate. *Hull* v. *Harker* (1906) 130 Ia. 190; *Vrossville* v. *Stewart* (1898) 77 Ill. App. 513. This view has been substantially embodied in the statutes of some states. *Jontz* v. *Northup* (Ia. 1912) 137 N. W. 1056; *cf. Aldritt* v. *Fleizchauer* (1905) 74 Neb. 661, 671.

BOOK REVIEWS.

EUGENE UNTERMYER, *Editor-in-Charge.*

PRINCIPLES OF CORPORATION LAW. By JOSEPH C. FRANCE. Second Edition. Baltimore: M. CURLANDER. 1914. pp. xxii, 463.

This is a useful elementary treatise on the Law of Corporations and fulfills very satisfactorily the purpose of the author, which is "to give to the student of Corporation Law a knowledge and understanding of its characteristic principles and problems." The arrangement and classification of the subjects is excellent, and covers pretty well the whole field, so far as is necessary for the purposes of the student. The author does not undertake, and within the scope of his work he could not be expected, to sound the depths or to throw much new light on the fundamental problems, including the nature of a corporation, the *de facto* doctrine, the nature of an *ultra vires* act, the nature and transferability of shares, and the relations of directors and stockholders; but this does not detract from the merits of the book as a handy little volume to give the student a general view of the subject, which can only be thoroughly learned by painstaking and critical study of the decisions. The author has shown discrimination in the selection of authorities, and these will put the student on the right track for a thoughtful and thorough examination of the subject. We note that the relative powers of directors and stockholders and the question of the control of one over the other receive scant treatment. The same thing may be said as to the question of the power of a corporation to alienate all its property.

In addition to a statement of the principles of the common law of corporations, the book contains the more important provisions of the Maryland Statutory Law. This makes the book of special value for the Maryland student, but it does not impair its value for the general student.

George F. Canfield.

THE LAW OF MECHANICS' LIENS AND GENERAL CONTRACTING OF THE STATE OF NEW YORK. By THOMAS H. RAY. Albany: MATTHEW BENDER & Co. 1914. pp. xlix, 657.

He who would add to the formidable accumulation of law text books assumes a grave responsibility toward his professional brethren. His justification must be that he has added something to the scientific and historical knowledge of the subject on which he writes, or that he has provided a useful tool to aid the practitioner in the performance of his daily task. It is on the latter ground that the author of this book is entitled to our friendly consideration. In it he unites a discussion of the important legal principles relating to building and construction contracts, referring particularly to the letting and performance of public construction contracts, with a discussion of the statute relating to Mechanics' Liens both against private property and upon public moneys due to contractors for public improvements, the whole being liberally supported by reference to New York authorities.

The value of such a book will, of course, depend not only upon the thoroughness with which the existing law on the subject is treated, but

also upon the completeness of its collection of authorities. Upon an examination made from this point of view one notes the omission of any serious comment on the effect of the prevailing Rate of Wages Law upon public improvement contracts, and the right of employees to assert their claims for the prevailing rate of wages under the Lien Law. Neither is there any examination of the effect on the contract of the provisions of the labor law making it mandatory to employ only citizens of the United States, with preference to the citizens of New York, in the construction of public works. Other gaps of lesser significance might be referred to.

Notwithstanding these minor omissions, however, the book will be found very useful to those practitioners who have frequent occasion to deal with questions arising out of the Mechanics' Lien Law, or with the law applicable to construction contracts. He will find that it serves his convenience as a book of reference to be used in the first instance in preference to the annotated statutes and digests to which he has been compelled to resort heretofore, and he will value the added facility afforded by it in enabling him to locate quickly the particular decision or the particular statute with which he is concerned.

Harlan F. Stone.

WERTHEIMER'S LAW RELATING TO CLUBS. Fourth Edition by A. W. CHASTER, of the University of London, L. L. B., and of the Middle Temple. London: STEVENS AND HAYNES. 1913. pp. xv, 318.

This little book, of which the first edition was published in 1885, should be, if not in every gentleman's library, at least in the library of every clubman who contemplates behaving otherwise than as a gentleman, or who has to do with club government. It is the best book in its field; the only others that we know of being Leach's brochure, Club Cases (1879), and Daly's little manual (1889). Snyder's pamphlet, the only American book left, is merely a compilation of New York statutes meagrely annotated. Mr. Wertheimer cites 338 cases, Mr. Daly only 42. Neither refers to the numerous American authorities, of which *Loubat* v. *LeRoy* (N. Y. 1883) 65 How. Pr. 138, (1884) 15 Abb. N. C. 1, (1886) 40 Hun 546, with the doctrine of which compare that of *Dawkins* v. *Antrobus* (1881) L. R. 17 Ch. Div. 615, 622; *Gebhard* v. *New York Club* (N. Y. 1888) 21 Abb. N. C. 248; *United States ex rel De Yturbide* v. *Metropolitan Club* (1897) 11 App. D. C. 180, are perhaps the most important expositions by our courts of the rights of club-members. Such a case as *Heaton* v. *Hull* (N. Y. 1900), 51 App. Div. 126, involving the right of the Grand Council of a Greek-Letter Society to withdraw a chapter's charter, of interest to American college men, would probably fill no British want. That case was, as the court said, without actual precedent; a remark quite true except in so far as the special term was reversed with two dissents, in which respect precedent abounds. The only citation of American authority that we find are three from Story on Agency, one from Story on Contracts, and two adjudicated cases, *Lafond* v. *Deems* (1880) 81 N. Y. 507, holding that where the rules of a voluntary association for moral, benevolent and social objects provide a method of dissolution, no remedy will be granted by the courts until that method has been resorted to, a point on which our author says there is no British precedent; and *Wachtel* v. *Widows' and Orphans' Society* (1881) 84 N. Y. 28 (cited as "Amer. Rep. 84 N. Y. 25") upon the point that the founda-

tion of a court's jurisdiction to enjoin the improper expulsion of a member of a voluntary association is his vested right in the association's property, of which expulsion would deprive him. Both of these American cases had to do with benevolent orders, the former with the "Independent Order of Rechabites," the latter with the "Noah Widows' and Orphans' Benevolent Society"; organizations somewhat different from the "West End Clubs" to which our author chiefly devotes himself. There is still opportunity for a book concerning both American and British club law, which would be of especial utility if it included in its scope decisions growing out of the administration of medical societies and other bodies of professional men organized for both social and scientific purposes. The book under review does not include an exposition of the rights of jockey clubs, strenuously litigated in the New York courts.

One with the true club spirit, to whom it is incredible that a gentleman should strive to break into a social club against opposition and almost ashamed to believe that a gentleman would care to retain membership by technicalities against the wishes of his fellows, will find in his Plutarch that the great law giver, Lycurgus, laid down the fundamental principles of club rules. Mr. Wertheimer, who treats clubs as a recent invention, does not mention those small dining companies established by Lycurgus, to the public feasts of which even children were sent, as to schools of temperance, "whereby listening to experienced statesmen, they learn to converse with pleasantry, to make jests without scurrility, and take them without ill humor." In those associations the eldest of the company said to each as he entered, "Through this" (pointing to the door) "no words go out." Did anyone wish to join a company, before he could do so the *caddichus,* a deep basin, was passed around. Those favoring the candidate dropped into it a ball of bread. Were anyone opposed he flattened his ball. And if there were but one of these flattened pieces in the basin, the suitor was rejected, so desirous were they that all the members of the company should be agreeable to each other. Were this strictly observed as a rule of social clubs Mr. Wertheimer's interesting treatise would be useless, but as the Spartan ideas as to the sanctity of property were not the same as ours, this book has its uses, which, for the American, are supplemented by our legal encyclopedias.

W. A. Purrington.

Outlines of International Law. By Charles H. Stockton, Rear-Admiral, U. S. N., retired. New York: Charles Scribner's Sons. 1914. pp. xvii, 616.

Admiral Stockton presents in convenient form an intelligent and useful summary of the principles of international law. As he states in his preface, information upon questions affecting international relations "is not only valuable to our representatives at home and abroad, but to all intelligent citizens, especially as the general government is becoming closer in its relations with and dependence upon its citizen voters." With this view he has brought the subject down to date and presents his information in such form as to be available for the general reader as well as for the more serious student. His preface bears date October 1, 1914, and if it had been written a month later, it may be doubted whether he would have referred to the conventions and declarations of The Hague and of the London Naval Conference

of 1909 as "amounting in fact to a partial codification of the laws and usages of war ashore and afloat." The Department of State, on the 19th of October, expressly declared that the Declaration of London, the ratifications of which were in fact never exchanged, was no longer to be accepted as a guide, and that the United States would in future rely upon the principles of international law. The fact is also well known that The Hague Conventions, so far as they relate to war, are by their very terms inapplicable as international compacts to the present conflict in Europe, one or more of the belligerents in each instance having failed to ratify them. Two years ago, in reviewing a work just then published on international law, I sounded a note of warning on this subject, particularly as regarded the Declaration of London.

Admiral Stockton, in his preface, says it has been declared by "good authority" that there have "arisen more vexed questions in international law during the first six weeks of this war than during the entire period of the Napoleonic Contests". It does not appear that the "good authority" furnished a detail of the novel questions thus referred to. Such a detail would be very useful and enlightening, especially to one who has witnessed the tendency in the present conflict to reproduce the conditions and the questions which were so fully dealt with during the Napoleonic Wars.

J. B. Moore.

WHERE THE PEOPLE RULE. THE INITIATIVE AND REFERENDUM, DIRECT PRIMARY LAW AND THE RECALL IN USE IN THE STATE OF OREGON. By GILBERT L. HEDGES. San Francisco: BENDER-MOSS CO., 1914. pp. vii, 214.

The leading title of this book is at odds with its "legal" binding; and of these, the binding is the better clue to its manner of treatment. "Where the People Rule" suggests another popular, sketchy, and probably doctrinaire exposition of the so-called "Oregon system" (there being, indeed, several of the sort already in the field). Instead, we have a careful abstract of the successive organic acts and enabling statutes by which the "rule of the people," having secured the statewide initiative and referendum in 1902 and having gained therein a potent weapon for further conquest, has extended itself in the direct primary law of 1904 (amplified in 1910 to permit a "presidential preference primary"), in the amendment of 1906, which gave the initiative and referendum local application and secured municipal "home rule," and in the recall amendment of 1908. Copious citations from the original text are made, and, although all the details essential to an understanding of the practical workings of the laws are given, the general effect is of baldness. This is aggrevated by an appendix, which, comprising nearly one-half of a relatively thin volume, is itself made-up largely of excerpts from the Oregon Code relating to elections, and of the entire state constitution, in which clauses relevant to the subjects at hand are briefly annotated.

The book, then, is of value to those who want to find out exactly what these laws are, rather than what they have accomplished. There is, to be sure, a complete table of measures voted upon under the statewide initiative and referendum, but the absence of comparative percentages in the statement of the votes thereon, which would illuminate crucial points in the operation of direct legislation, deprive it of much of its possible value. It is less useful, even for Oregon, than the

extensive tables given in President Lowell's recent book on "Public Opinion and Popular Government". Especially valuable, however, is the enumeration and careful discussion of each of the specific cases in which the recall has been invoked.

Attention is given at all points to judicial construction, and a separate chapter is devoted to this phase of the matter. Inasmuch as the construction of the loose "home rule" provisions of the Oregon constitution presents the only problem of importance here and is, moreover, one of growing interest to the country at large, it is to be regretted that Mr. Hedges is not more careful in his treatment of the cases in point. He could hardly be asked to arrive at any very certain conclusions about this matter; if he is to be blamed at all, it is because of his over-confident assumption that the cases will bear generalization.

Criticism and evaluation are outside the obvious intent of the book, and the author's commendable restraint in this regard is illustrated by his final chapter of "Comment"—a matter of only four pages. He discreetly presumes that, although "the people of Oregon cannot retreat now nor do they wish to," nevertheless their scheme is still in its infancy. One thing he shows clearly,—that whatever apathy or blindness there may be on the part of the voter may be attributed largely to the congestion of measures upon the ballot, and that this may be traced in turn to the irresponsible attitude of the public generally toward the signing of petitions. The author's constructive suggestions are two: first, a special court, which shall perform a function somewhat analogous to that of the judiciary committee in a state legislature and shall pass upon the constitutionality of any measure to be proposed under the initiative and referendum, prior even to the circulation of the petition; second, compulsory voting, as being logically imperative in view of the new responsibility which the electorate has imposed upon itself. Unfortunately, his rash declaration that the proposed abolition of the state senate may presage the complete disappearance of every representative body in the state, indicates a serious misunderstanding of the political philosophy underlying the People's Power League of Oregon, and tends to lessen one's confidence in the author's judgment.

"Where the People Rule" is modestly commended "to the lawyer, student and citizen alike." The student of government, whether as lawyer or citizen, will find it useful for reference.

Arthur W. Macmahon.

War and Insurance. By Josiah Royce. New York: The Macmillan Co. pp. xlviii, 96.

One of the lasting effects of the European war, which is just beginning to affect the American public, is the flood of literature upon the subject. This contribution may be characterized as speculative, a feature quite natural in view of the fact that the conflict has but begun, and a commentary thereon could hardly be expected. Through the instrumentality of the fiduciary trust, and of insurance, Mr. Royce outlines a novel scheme in the time-worn project of abolishing war. The system proposed is based on mutual insurance, but if a disgruntled nation prefers to forfeit its premium and take up the battle-flag, the author has suggested no method other than that of arms to enforce an international subpoena.

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VALIDITY OF RATE REGULATIONS. By ROBERT P. REEDER. Philadelphia: T. & J. W. JOHNSON CO. 1914. pp. xv, 440.

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FRANCHISES.

Some years ago a public service corporation in one of our States placed an abnormal and fictitious value upon its franchises to justify its watered stock. It then sought to earn dividends upon this stock by charging the public unreasonable rates. A commission of the State, recoiling from this unwarranted and defenseless corporate action, said, among other things, in its report:

"The commission believes that these franchises, granted by the people without compensation, should not be capitalized against the public, thereby compelling the public to pay a profit upon the value of the favor granted by it."

The people, revolting against corporate greed and monopoly wealth, have demanded the destruction of artificial aids and the rejection of all spurious claims to profits which have not been rightly earned by fair and actual service. Public grants have been curtailed, and "protection" for growing industries has been largely withdrawn. The public is out for its share in public service profits. The ancient theories are called to the bar to be rejudged, and publicists must defend their theories, and legislators must give an account of their doings. Men nominated for high offices must be certified to be immune from corporation virus, and one of the tests of their right to hold public office is their views regarding the right to earn income upon franchise values in corporate hands.

Without argument, and without prejudice, it may be of some aid to civic righteousness to marshal the facts and take note of the law upon the subject of public franchises. The questions for review here are:

1. Is a franchise "property" in the hands of the grantee?

2. If property, has it intrinsic value?

3. If it has value, is that to be taken account of (a) in fixing capitalization? and (b) in determining rates and charges?

I. Is a Franchise Property in the Hands of the Grantee?

What is a franchise? Blackstone defines it as "a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject."[1]

Divested of the forms under which it was granted and the particular favors bestowed under monarchial governments and feudal systems, a franchise is a right, privilege, or power, of public concern, which cannot be exercised by private individuals at their will, but must be secured by grant, in some form, from the sovereign power of the territory in which it is to be exercised. It carries with it an assurance of right of user, similar in character to grants of other rights and things, and there is a reciprocal agreement on the part of the grantee to use it in accord with public policy. Kent gives this definition:[2]

> Franchises are "privileges conferred by grant from government, and vested in individuals. . . . They contain an implied covenant on the part of the government not to invade the rights vested, and on the part of the grantees to execute the conditions and duties prescribed in the grant."

In *Society for Savings* v. *Coite*,[3] the Supreme Court of the United States said: "Corporate franchises are legal estates vested in the corporation itself as soon as it is *in esse*," and the Court held that the franchise was property, subject to assessment and taxation against the grantee for the support of the State.

In *Monongahela Navigation Co.* v. *United States*,[4] the Supreme Court said:

> "If the property is held and improved under a franchise from the State, with power to take tolls, that franchise must be paid for, because it is a substantial element in the value of the property taken. . . . such franchise was as much a vested right of property as the ownership of the tangible property."

In this case it was held that the United States could not condemn and acquire for its own use the improvements of the navigation company in the Monongahela River without paying for the franchise. In other words, although the franchise was a gift from the State, for which nothing was paid, it could not be

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[1] 2 Bl. Comm. *37.

[2] 3 Kent, Comm. *458.

[3] (1867) 73 U. S. 594, 606.

[4] (1893) 148 U. S. 312, 337, 344.

retaken by the State from the grantee without payment therefor.

In another case[5] the Supreme Court said:

"It cannot be disputed that franchises of this nature are property and cannot be taken *or used* by others without compensation."

Here, it will be observed, not only the franchise, but *the use* of the franchise is stated to be property which cannot be taken without compensation. In numerous cases, state and federal, this doctrine has been clearly announced with "tiresome repetition."

In nearly every State of the Union, franchises in the hands of the grantees are assessed for taxation under legislative acts. In many States, special taxation is imposed against this class of property.

The grants of franchises are often attended with conditions, and power of revocation is reserved to the State, which affects materially the valuation to be placed upon the franchises. In some States, franchises to public service corporations are granted for an indeterminate period, with provision that the State or municipality may purchase the property and determine the franchise. In such cases, where the purchase is determined upon and the franchise revoked, there would be no value attaching to the franchise that would enter into the purchase price, for the right ceases upon the determination to purchase.

With the question of how to value a franchise, or what its valuation should be, we have nothing to do in this review. Because valuations may be affected by the terms of the grant, and the performance of the assurance on the part of the State not to invade the right rests upon the good faith of the electorate, it cannot be said that franchises are without intrinsic value.

Since the foundation of the government it has been the public policy, both in the States and the federal government, that the ownership should be in, and the operation of railroads and other public utilities should be carried on by, private persons, natural or corporate. To secure the private capital necessary to construct, maintain and operate these utilities it is necessary that public franchises should be granted to them by the State. These franchises have been more or less liberal according to the necessities and the peculiar difficulties in securing facilities requiring private capital. Where the risks are great and the profits in a venture uncertain, larger inducements by way of grants are required and have been

[5]Willcox *v.* Consolidated Gas Co. (1909) 212 U. S. 19, 44.

given. Two elements form the inducement to private capital to enter into these enterprises: one is the fact that tangible things become of greater value, measured by whatever test applied, when there is added the franchise which enables them to be used for specific purposes not open to private capital acting independently of such franchises; and the other is the prospective advance in values that may come to the property as a result of the operation of such utilities and the growth of population and industries along the line. The property as a whole consists of the tangible things and the right to use them for a specific purpose. These rights thus attached constitute private property within the judicial interpretation of the constitutional provision prohibiting the taking of private property for public purposes without just compensation. The covenants on the part of the public are that the rights so granted, whatever they may be, shall not be invaded except where such a privilege is expressly reserved in the grant. A franchise thus granted becomes a true and in a peculiar sense private property for the period within which it may be enjoyed. There is such a vital relation between the tangible and the intangible property that it is well-nigh impossible to value the one without valuing the other. The tangible property, standing alone, is valuable only for those uses to which it may be put by a private citizen; when these things are assembled into a form for use as a public utility the value is only "scrap" value without the franchise; but when used under the franchise the value is necessarily and greatly enhanced, and this enhancement represents the value of the franchise. To take away the franchise before the right to use it has expired by the terms of the grant is, as has been so often held, a taking of private property, and it would seem to follow, as inevitably, that to deprive the grantee of an income or reward *for the use* of the franchise, is also a taking of private property. In the *Monongahela* case,[6] the Supreme Court said:

"If the property is held and improved under a franchise from the State, with power to take tolls, that franchise must be paid for, *because it is a substantial element in the value of the property taken. . . . such franchise was as much a vested right of property as the ownership of the tangible property.*"

This answers our first question; the franchise is property in the hands of the grantee.

[6]Monongahela Nav. Co. *v.* United States (1893) 148 U. S. 312, 337, 344.

II. If property, has it an intrinsic value?

The value of intangible property is largely in its effect upon tangible things. A telephone receiver and transmitter may cost very little money to make, but when the government gives, by patent, the exclusive right to make them and dispose of their use, the value of the receiver and transmitter is more than doubled. This is not an artificial value. It is a real, intrinsic value upon which the owner realizes substantial returns; he does so of right, it is not a gift. The patent has not changed or altered the physical condition of the tangible things, but it has added very much to their intrinsic value. So grants of franchises may add very largely to the value of tangible things. Usually these grants are in the nature of legal monopolies. Wood and steel have a fixed market value; but when they are placed in a street under a franchise permitting the operation of street cars and the collection of tolls, these physical things become of greater value. The enhanced value is solely the result of the franchise. Take away the franchise, and the physical property will not scrap at half its cost. A franchise also guarantees the integrity of the investment in things, and makes it possible for the investor to secure a reasonable reward for the use of his property, provided, always, it can be done at reasonable charges. The possession of a franchise then gives to things, commonly designated as "plants", a value as going concerns, with present and future earning capacities and an uninterrupted flow of income, from which expenses of operation, interest, and dividends upon capital may be paid. The whole enterprise rests upon the franchise as its foundation. Withdraw the franchise, and immense loss ensues; the physical property is of little value. It cannot be doubted, therefore, that a franchise is property, and as such it has intrinsic value. These conclusions are supported by the best legal authority and rest upon a sound economic basis.

III. If it has value, is that to be taken account of (*a*) in fixing capitalization? (*b*) in determining rates and charges?

Capitalization. Excepting National Banks, there is no federal law which requires that the capitalization of a corporation shall be based upon, and represent actual values. But it is everywhere regarded as sound financiering to make the capitalization the equivalent of the value of the property

owned by the corporation. Some small percentage may be added for financing the enterprise, but with this we have nothing to do in this discussion. Assuming, therefore, that capitalization should be based upon the value of the property capitalized, the question arises, should this valuation include the franchise? We have seen that the franchise is property in the grantee; that the value of tangible property is enhanced by the franchise; and that in case of a purchase or condemnation the franchise value is to be included. It would seem to follow logically and inevitably, from every point of view, that capitalization may represent the true value of all of the property, tangible and intangible, owned and possessed by the corporation. In fact, it is difficult to find, by any process of sound reasoning, an objection to this conclusion.

Just how this valuation shall be arrived at is a matter of little consequence in this discussion. The important fact is that the franchise is in some way to be accounted for in the valuation. In most legislative acts directing the valuation of public service corporations it is provided that the franchise shall be valued separately. This is true of the Congressional act to regulate commerce. There are varying suggestions by accountants and economists as to the method of arriving at the value of a franchise independently. No doubt a jury in a condemnation suit, upon evidence submitted to it, may arrive at an independent estimate of the value of the franchise, if required to do so. This, however, is not essential. The property may be valued as a whole, as railroad property or as an electric light plant. The value of the plant as a going concern, with tangible property and a franchise to operate for a given time, may be valued as a unit. This gives full effect to the claim that franchises should be included in the valuation. In a recent case in the Supreme Court of the United States[7] this general method seems to have been approved. The court said:[8]

"Then again, although it is argued that the court excluded going value, the court expressly took into account the fact that the plant was in successful operation. . . . . On the one side if the franchise is taken to mean that the most profitable return that could be got, free from competition, is protected by the Fourteenth Amendment, then the power to regulate is null. On the other hand if the power to regulate withdraws the protection of the Amendment altogether, then the property is nought. This

[7]Cedar Rapids Gas Co. *v.* Cedar Rapids (1912) 223 U. S. 655.
[8]At pp. 669-670.

is not a matter of economic theory, but of fair interpretation of a bargain. Neither extreme can have been meant. A midway between them must be hit."

If a new railroad is constructed and when ready for operation the physical property has actually cost $60,000 per mile, and the company has a franchise to operate it as a steam railroad for fifty years, the value of that property, assuming it to be well located, is not $60,000 per mile, but it is that amount plus the value of the right to operate it as a steam road for fifty years. Suppose we assume that that franchise raises the value of the physical structure fifteen per cent. This would add $9,000 per mile, which, with some allowance for financiering, might justify a capitalization of $70,000 per mile. To require it to capitalize for less and sell its stock at par would be compelling the sale of the property at less than it could be acquired for by eminent domain. Capitalization should represent actual purchase value, and purchase value, according to the authorities, clearly includes the value of the franchise. "There is but one value, and that is the value of the structure *in use*."

Rates and charges. As already observed, the franchise increases the value of the tangible property and insures to the investor the opportunity to secure, if possible, a reasonable return upon his investment. This return must be commensurate with the risk which he assumes in establishing the public utility. As the government does not guarantee returns to investors in public utilities, it must necessarily allow a return that will attract capital and compensate the investor for the risk assumed. Any public policy which disregards this fundamental practice will operate to discourage capital and prevent its investment in these securities. If the government desires to acquire these services at the lowest possible price by allowing the investor only the ordinary income upon the actual money paid out, then the government will have to assume the risk and guarantee a fixed income upon the investment to secure further construction by private capital. So long as the present policy of inducing private capital to enter this field of investment prevails, sufficient returns will have to be allowed to make the investments attractive. This may be accomplished upon either of two theories, both of which reach the same result. In fixing the value upon which a return may be earned, the cost of the property (assuming it to be new), together with a fair valuation of the franchise, may be taken as a total valuation—as suggested in the case of capitalization—and a fair return allowed

upon that total, say for illustration, six per cent. Or, the value of the franchise may be omitted and a higher return allowed upon the actual cash investment—say seven per cent. If we assume that the franchise represents one-seventh of the total value for purchase or capitalization, then we have the same result in the latter, as in the former case. This latter method seems to be the favorite one with those who are particularly shy about valuing franchises, their theory being that the public ought not to pay a return upon that which it has given to the corporation without compensation. This theory has its weakness; it is out of line with the law. If the government desires to purchase or lease a piece of ground from a land grant railroad, the land having been conveyed to the company under the land grant act, the government cannot very well say, we gave you this property; it cost you nothing; therefore we will not pay you anything for the use of it. Or, take the case of a patented article. The government says, we want the use of this typewriter; it costs you $33.50; to be sure, you can sell this for $100.00, but the difference between the $33.50 and the $100.00 represents the value of the patent right which the government gave you and for which you paid nothing, therefore, the public will not pay any rental upon the value of the patent right. Of course, in each instance the government would have to pay the full value if it condemned the land or the typewriter, because the courts have so determined. But valuation for use only is with the administrative department of the government, and, it is said, for the *use* of the property it may not value that which the government gave and allow a return to be earned upon it, for the reason that no compensation was paid therefor. If a *cash* compensation had been paid "we would value that."

It is difficult to see the difference in principle between these illustrative cases and the case where a franchise has been granted. In each case we are dealing with *property of value* in the grantee. And then the premise of the economist is wrong; there is in each grant a satisfactory and valuable consideration to the public. The land grant was given to secure a transcontinental railroad; the patent right, to encourage useful inventions; and, in the case of the public utility, the franchise was given to secure private capital to perform a governmental function. The whole structure of the reasoning of this school seems weak and out of line. It refuses to recognize property values which exist in the grantee according to the long established law of the land.

Perhaps we should not quarrel with the means or method so long as the righteous result is obtained. If a frank, open and strictly fair valuation of franchises and an allowance of a lower rate of interest on the total valuation is objectionable, why then by all means take the valuation of the physical property and increase the rate of interest or return allowed. In buying a horse, the horse dealer said to me: "He is perfectly safe. He will not shy; but if he does, put on blinkers and he will go through."

Among those who like to see a conformity of conduct to law, the feeling will prevail that the better practice in this matter is to conform to the requirements of the acts of Congress and many of the state legislatures, and value the franchises separately. Let us know definitely what valuation is placed upon the physical property and also upon the franchise, and let the two combined be the total valuation of the property of the public service corporation. All fictitious or fanciful valuations of corporate franchises will be, and should be, severely condemned, whether the valuation be made by the corporation or by servants of the government. The valuations of franchises should be strictly fair, adding to the physical or tangible property that increase in value which attaches to it by reason of the franchise right to operate it as a public utility and collect reasonable tolls for services rendered. This method brings the practice into harmony with the law. It recognizes both classes of property, gives full consideration to each class in making the valuation, and then allows a return to be earned upon the total valuation that is comparable with the returns earned in other businesses involving similar risks. Let nothing be done in the administration of public affairs that is radically unsound, and do not seek right results by covert means. Conformity to well established laws, in theory and practice, is the best assurance of a stable government and the prevalence of justice; and publicity in the conduct of public affairs is the best guaranty of civic righteousness.

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THE POWERS OF COURTS OF EQUITY.

II. Action "in rem" by courts of equity.

We have thus far analyzed the meaning of the phrases *in rem* and *in personam* as used in the classification of (1) rights, (2) actions, (3) judgments and decrees, and (4) proceedings under judgments and decrees. This of course has all been preliminary to the attack upon our main problem: What are the powers of a court of equity, and to what extent is it true that "the law acts *in rem* while equity acts only *in personam*"? This latter statement was made in several of the quotations from eminent authorities printed at the opening of Part I of this article. We may perhaps introduce the present part of our discussion by the following quotation from a recent Wisconsin case:

"In the early stages of equity jurisprudence decrees were enforced only *in personam*. . . . This rule has long since given way to the paramount rule that equity may in all cases so frame its decrees as to make them effective to do equity, and now the forms of equitable relief are as various as the transactions investigated and regulated in equity."[1]

There is of course a very wide gulf between this statement and that previously quoted, and in what follows an attempt will be made to show that the learned justice last quoted has come much nearer to stating the truth about modern equity than did the other learned authors and judges. Perhaps the best way to get at our problem is to examine a series of concrete cases and see exactly what it is that the chancellor does and does not do, comparing his action constantly with that of a law court in similar situations. Let us notice in each case the nature of: (1) the primary right, if there be one; (2) of the action; (3) of the decree; (4) of the procedure to enforce the decree. Before we do this, it may be well to notice another case of carelessness in the use of language of which writers and courts are guilty in discussing the problems that are dealt with by courts of equity. The reference is to the double meaning given to the word "jurisdiction". In its strict and proper sense "jurisdiction," so far as it relates to courts, means power to take valid action which will be binding on the parties until set aside or reversed by some competent tribunal. In the equity cases, however, in many cases all that is really meant by the statement

[1] Timlin, J., in McMillan *v.* Barber Asphalt Paving Co. (1912) 151 Wis. 48.

that "equity has no jurisdiction" in a given case is, that equitable relief will not be given by courts of equity, though, if it were given, the decree entered, even if erroneous, would be binding on the parties until some competent tribunal took action to alter it in some way. This difference is an important one for the reason that, if the court had no jurisdiction, *i. e.* power, to make the alleged decree, there is no decree to which any attention need be paid. For example, commitment for contempt of an "injunction" granted by a court without jurisdiction results in an unlawful imprisonment, against which relief may be had by habeas corpus proceedings; if, on the other hand, the court had jurisdiction, the party disobeying is guilty of contempt, even though it is clear that on appeal the appellate tribunal will order the injunction dissolved. The importance of this distinction is well illustrated by the case of *In re Sawyer*.[2] The defendants in that case succeeded in obtaining their release upon habeas corpus proceedings, the majority of the Supreme Court of the United States taking the view that even though personal service had been had, courts of equity had no jurisdiction over the kind of dispute involved. The minority held that the court had jurisdiction and that the imprisonment was therefore lawful, even though it was clear that on an appeal the injunction would have been dissolved as violating well-settled rules for the exercise of equitable jurisdiction. This case illustrates an important fact, often lost sight of, that even though the court of equity has jurisdiction over the parties, it may still be without jurisdiction over the subject matter in controversy. In the case of *Toller* v. *Carteret*,[3] already cited, the learned Lord Keeper was guilty of this error, his argument being that since the defendant was served within the jurisdiction, the court necessarily had power to enter a decree *in personam*.[4] In this discussion we are of

[2](1888) 124 U. S. 200. The Mayor and City Council of Lincoln, Neb. were preparing to remove one Parsons from the office of police judge. He obtained a preliminary injunction from the Circuit Court of the United States on the ground that the federal Constitution was being violated. The Mayor and Council proceeded with the removal proceedings and Parsons was forcibly removed from office. Attachments for contempt were issued and the Mayor and Council were adjudged guilty of contempt and fined. Failing to pay the fines, they were taken and held in custody by the marshal. Thereupon they petitioned the United States Supreme Court for a writ of habeas corpus, which was ordered issued.

[3](1705) 2 Vern. Ch. 494.

[4]Other illustrations of this lack of jurisdiction because of the subject matter of the litigation, even though the parties have been personally served, are to be found in the following cases: Dickey *v.* Reed (1875) 78 Ill. 261; Fletcher *v.* Tuttle (1894) 151 Ill. 41, and cases cited in the

course dealing only with the question of jurisdiction in the strict sense, *i. e.*, the powers of courts of equity to take valid action.

Let us begin by comparing what happens in the case of a bill in equity, the object of which is to obtain a decree solely for the payment of a sum of money, with the corresponding proceedings in an action in a court of law, the object of which is to obtain a money judgment. For example, in an ordinary bilateral contract for the purchase and sale of real estate, the vendor asks specific performance. Under the English and many American authorities he is entitled to this, and this is here assumed. The decree being duly entered, what happens? How does it differ from what happens under a judgment at law where the unpaid vendor (who has conveyed the property) obtains judgment for the purchase price? In both cases the primary right is *in personam*; the actions, the judgment and the decree are all *in personam*. Not until we reach the procedure to enforce judgment and decree respectively do we find any difference.

The judgment at law reads that plaintiff recover so much money; the decree in equity, that defendant is ordered to pay the sum. The traditional chancery procedure of course was, in the first instance, to commit the defendant to jail for contempt.[5] Before discussing this let us follow the common law procedure on the judgment. Execution is issued either against the person or property of the defendant. In speaking of execution against the person, Blackstone says: "The intent of it [the writ of *capias ad satisfaciendum*] is to imprison the body of the debtor till satisfaction be made for the debts, costs and damages. . . . The writ is directed to the sheriff, commanding him to take the body of the defendant and have him at Westminster on a day therein named, to make the plaintiff satisfaction for his demands, and if he does not then make satisfaction, *he must remain in custody till he does*. . . .[6] When a man is once taken in execution upon this

opinion in that case; State *v.* Aloe (1899) 152 Mo. 466, 47 L. R. A. 393. The last case contains an interesting use of the extraordinary legal writ of prohibition. The state Supreme Court issued a writ of prohibition to prevent the Circuit Court from assuming jurisdiction in equity over removal from office. To find a legal writ used directly to restrain a court of equity from acting beyond its powers is certainly an interesting development, but in view of the present organization of courts in the State in question, entirely justifiable.

[5]Whether this can be done to-day in all cases of decrees for money will be discussed below.

[6]The italics are the present writer's.
This is, of course, generally not the law to-day in the United States.

writ, no other process can be sued out against his land or goods."[7] This form of execution might be had upon almost every species of complaint, though in the earlier days this was not true. If the plaintiff gave the defendant, when in execution, permission to go at large, the judgment was discharged, irrespective of the intention of the plaintiff.[8] This seems to have been a consequence of the rule which forbade the suing out of other process after taking defendant on a *capias*. The mere imprisonment itself, however long, (unless for life), apparently never had the effect at common law of discharging the judgment.[9] If the judgment creditor chose, instead of taking defendant on a *capias* he could sue out a writ of *fieri facias* against the defendant's goods and chattels; or a writ of *levari facias* against his goods and the profits of his lands; or a writ of *elegit* against his goods and the possession of his lands.[10] It is to the proceedings upon the writ of *fi. fa.* that attention is usually directed by writers who are comparing law and equity. Here of course the law proceeds *in rem*, the sheriff selling the goods and chattels (including chattels real) until he has raised enough to satisfy the judgment. Under the writ of *levari facias* in addition to seizing and selling the goods, the sheriff could receive the rents and profits of defendant's lands and apply them on the judgment. Under the writ of *elegit* the goods and chattels of the defendant were not sold, but appraised and delivered to the plaintiff at the appraised price, in whole or part satisfaction of his debt. If the goods were insufficient, then a moiety of lands which defendant had at the time of the judgment was also delivered to the plaintiff, to hold till out of the rents and

[7] 3 Blackstone, Comm. *414-415. The *ca. sa.* could be sued out, as a general rule (to which there were many exceptions), only against such as were liable to be taken upon a *capias ad respondendum.* 3 Bl., Comm., c. XXVI. It seems to have been the universal rule at common law that whenever a *capias* was allowed on mesne process, it could be had on the judgment itself: 2 Cooley's Blackstone, 257, note (2). The *capias* on mesne process at common law originally could be had only in cases of injury accompanied by force, such as trespass; but by various statutes, and judicial legislation, by means of fictions, was extended to cover account, debt, detinue and finally all actions on the case. The last extension was made by the Statute of 19 Henry VII, c. 9; 3 Bl. Comm., c. XIX.

[8] 2 Cooley's Blackstone, 257, note 3, and cases cited there; Freeman, Executions (3rd ed.) § 464.

[9] The reference is entirely to the common law rule. Under modern statutes the rule is doubtless everywhere different.

[10] 3 Bl. Comm., c. XXVI. The writ of *elegit* was introduced by the Statute of Westminster II, 13 Edw. I, c. 18. The common law prior to that time limited the plaintiff to goods and the present profits of lands.

profits thereof the balance of the debt was satisfied or defendant's interest expired.[11]

Let us now return to the chancery proceedings. Suppose that, after the defendant had been put in jail for non-payment, he still remained obdurate: What happened? If proper proceedings were taken, a writ of sequestration was issued. The sequestrators under the sequestration could take all the goods and chattels in the possession of the defendant, or which they could come at without suit or action. The writ of sequestration also authorized the sequestrators to enter upon all "messuages, lands, tenements and real estates" of defendant, and to "collect, take and get into their hands the rents and profits thereof". Where the sequestration was for non-performance of a decree (for the payment of money) a sale of goods and chattels thus acquired could be ordered and the proceeds were applicable to the payment of the plaintiff's demand. This was done only on application to the court by the party in whose favor the decree was entered. Under this proceeding "it seems that the court will direct the sale not only of perishable commodities, but also of goods, such as rents paid in kind, or the natural produce of a farm, or household goods and furniture. The court will not sell terms of years, or leasehold estates, or any subject which passes by title and not by delivery, although it will direct the profits to be applied; because sequestrators can give no warranty for title, the property not being vested in them." Leases of land also were granted by the sequestrators under authority of the court and the rent applied to the plaintiff's demand.[12] We are now in a position to see to what extent these methods of procedure really differ. In practical effect there is some but only a little difference. In both cases the defendant may be imprisoned until he pays the sum due. Is the object of imprisonment in both tribunals to compel the defendant to pay the amount of the plaintiff's claim? The common law court did not in form order the defendant to pay, and it was Professor Langdell's idea that the court was not trying to make him do so. He says:

"A court of common law never lays a command upon a litigant, nor seeks to secure obedience from him. . . . Even when the defendant is subject to arrest, his arrest and imprisonment are not regarded by the law as a means of compelling him to pay the judg-

[11]3 Bl. Comm., *loc. cit.* Execution against lands in the modern sense was unknown even in Blackstone's days, except where the Crown was plaintiff. Martin, Civil Proc. at Common Law, § 383. See note 20, *infra*.

[12]2 Daniell, Chancery Practice (1st ed.) 630-650; (2nd ed.) 1259-1265.

ment; but his body is taken (as his property is) in satisfaction of the judgment."[13]

It seems difficult to reconcile this view with what common law writers like Blackstone say, and also with what the court did. Defendant could be kept in jail until he paid. This rule is hard to understand if imprisonment were really regarded as satisfying the judgment, for one would expect (as under some modern statutes) an imprisonment for a definite time, depending perhaps on the amount of plaintiff's claim.[14] The fact that the judgment was discharged if the plaintiff gave the defendant permission to go at large after arresting him on a *capias* seems to be a necessary result of the other rule that the common law would not permit plaintiff to adopt any other method of execution if he chose to arrest the defendant on a *capias*.[15] However, assuming for the moment that Professor Langdell's theory is correct, the fact remains that the common law court put the same personal pressure on the defendant that the chancellor did. In whatever sense we use *in rem* as applied to procedure to enforce judgments and decrees, the common law court when it imprisoned the defendant was not acting *in rem*. If acting *in personam* means merely dealing with a defendant's physical person by imprisoning him, the law does act *in personam*. If, however, we say that a court is not acting *in personam* unless the object of the imprisonment is to induce the defendant to pay, the law court, if we accept Mr. Langdell's views as to the object of the imprisonment, is not acting *in personam*, but equity is. That, however, the object of the imprisonment of the defendant at law and equity is the same, *viz.*, to induce him to pay the plaintiff's claim, seems very clear, both from what is said about it in the books and also from certain rules which are identically the same in both courts. Under the *capias ad satisfaciendum*, says Blackstone,

[13] 1 Harvard Law Rev. 116-117.

[14] A conspicuous example of this in modern law is found in the case of municipal corporations, which often have the power to impose penalties, which, if not paid, result in defendant's imprisonment for a definite time in proportion to the amount of the penalty.

[15] This rule may suggest that Prof. Langdell's view is correct; but the fact that if the plaintiff chose an *elegit* he could not, after getting into possession of the land, whatever its kind or value, thereafter have a *capias*, seems to show that this is not true. No one would contend that the judgment was satisfied until, by means of the *elegit*, the amount of plaintiff's claim was realized. Imprisonment for life did result in ending the judgment, but nothing short of that would do. The statute of 21 Jac. I, c. 24, prevented even this result, by enacting that if defendant died while imprisoned under a *capias*, the plaintiff could sue out a new execution, either against lands, goods or chattels.

"When a defendant is once in custody, he is to be kept *in arcta et salva custodia*; and if he be afterwards seen at large, it is an *escape*; and the plaintiff may have an action thereupon against the sheriff for the whole of his debt."[16] Compare with this Daniell's statement as to the duty of the sheriff in the equity case: "It is to be observed, however, that an attachment for non-performance of a decree is not, like an attachment for non-appearing or answering, a bailable process, and that the party, when taken upon it, must be committed to prison, and not suffered to go at large. And it seems, that if, after arresting a defendant upon an attachment for not obeying a decree or order for payment of money, the sheriff suffers him to go at large, the sheriff himself will be ordered, upon motion, to pay the money. A similar order was made by Lord Eldon, who ordered a sheriff not only to pay the money for which the attachment was issued, but the costs of the contempt incurred by the party and of the application."[17] The fact that defendant's poverty prevented him from discharging the judgment did not entitle him to be released if imprisoned under execution against the person; and the same thing seems to have been true in equity.[18] The abolition of imprisonment for debt has of course changed this in both courts for many actions. In the light of all the evidence, it seems fair to say that the object, or one of the objects, of the imprisonment of a judgment debtor at law was to induce him to pay the debt. Even if this were not so, it seems that to imprison the defendant must fairly be called acting *in personam* rather than acting *in rem*. To do otherwise is to magnify unduly the differences that did exist between legal and equitable procedure in cases where the recovery of a sum of money was sought.

To sum up: The common law, as we have seen, restricted the plaintiff to this procedure *in personam* if he chose it, but did not require him to use it, and did not permit it in all actions. Equity, on the other hand, doubtless because its decree was in the form of an order to the defendant to do his duty, required plaintiff to proceed *in personam* in the first instance, and refused to allow him to get at the defendant's property until it appeared that procedure against the person of the defendant had been unsuccessful in

[16] 3 Bl. Comm., c. XXVI.

[17] 2 Daniell, Chancery Practice (2nd ed.) 1252.

[18] "Inability is never an excuse for not performing a decree for payment of money." Langdell, Brief Survey of Equity Jurisdiction, 53.

bringing him to terms.[19] When the procedure *in personam* had failed, equity permitted in addition the use of procedure against the property of the defendant. If the plaintiff at common law used execution against property, he could get at defendant's goods and chattels (including chattels real) and the rents and profits of his land, and also get possession of a moiety of the land in order to get the rents and profits of the same. The title to goods and chattels passed either to the execution purchaser if they were sold, or to the plaintiff if they went to him under an *elegit*; and the same was true of the rents and profits. Interests in land (other than chattels real) could not be got at, *i. e.*, there was no procedure *in rem* in the common law court (the judgment being *in personam*) to transfer title to land.[20] Under the sequestration in equity, the result was very much the same. Goods and chattels and rents and profits of land could be got at, but not interests in land.[21] Can we say that equity was still acting *merely in personam* while the law court was acting *in rem*? In speaking of writs of sequestration, Professor Langdell maintained that "after all these are scarcely exceptions to the rule that the chancellor has no jurisdiction *in rem*. . . . The power of creating and extinguishing titles the chancellor never had nor claimed to have, except when it was given to him by statute."[22] Now it must be noted that Daniell assumes that the purchaser under the sale by the sequestrators got title, and it seems that the chancellor did make just this assumption.[23] No decision of a common law court has

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[19]2 Daniell, Chancery Practice (2nd ed.) 1252.

[20]An English statute of 1732, applying only to English colonies, subjected lands of the execution debtor to sale on execution. 17 Cyc. 950. The extension in England came much later, by the Statute of 1 & 2 Vict., c. 110.

[21]Apparently not even chattels real, though there seems to be no good reason why this limitation was adopted. Choses-in-action caused much discussion, but space to go into the matter fails. See Keighler *v.* Ward (1855) 8 Md. 266.

[22]Langdell, Summary of Equity Pleading (2nd ed.) 35, note 4. Note that the learned writer uses "jurisdiction *in rem*" to mean "power to pass title". Whether procedure *in rem* includes more than this will be discussed later; assuming, for the moment, this restricted use to be correct, it follows that the law court when it imprisons defendant on a *ca. sa.* is not acting *in rem*. If it is not acting *in personam*, (as I think it is), it must be doing some third thing for which we have no name. The learned writer had, in the text to which this note was appended, said: "To some extent the Chancellor has asserted and maintained the right to proceed *in rem*." He then describes writs of sequestration and assistance, and adds the note quoted from, thus seeming to maintain that in proceeding by sequestration and writ of assistance the chancellor was still acting *in personam*.

[23]2 Daniell, Chancery Practice (2nd ed.) 1256.

been found in any modern time—that is, after sequestration became the regularly accepted order of things,—settling the question. In view of all the evidence, the assertion that title to chattels did not pass under the sequestration sale seems to be not proved. It seems to be based upon a very wide generalization derived from the well-known fact that the chancellor never claimed to have (in the absence of a statute) the power to pass complete title to interests in real estate. When we recall that the common law court did not possess this power in most actions, this does not seem to warrant so sweeping a generalization. Undoubtedly Coke would have denied that the sequestrators could pass any title, for, as Daniell says:

"There appear, however, to have been great struggles between the Courts of Common Law and Courts of Equity before this process was established, the former holding that a court of Conscience could only give remedy *in personam* and not *in rem,* and that sequestrators were trespassers, against whom an action at law would lie; and to such extent does the objection of the Courts of Law to this process appear to have been carried, that according to a case cited by the Lord Chancellor [Nottingham], in *Colston* v. *Gardiner,* a question was entertained upon an indictment for murder, where one was killed on laying on a sequestration, whether the homicide was justifiable or not. 'Whereupon a pardon was sued out. . . . But these were such bloody and desperate resolutions, and so much against common justice and honesty, which required that the decrees of this Court, which preserve men from fraud and deceit, should not be rendered illusory, that they could not long stand', and the process is become, by long use and acquiescence, and is now looked upon, as the legal and ordinary process of the court."[24]

In view of all the evidence is it not probable that the correct statement is: Originally the chancellor could not act *in rem* in the sense of passing the legal title to property of any kind; but, in the development of our judicial system, he asserted successfully the power to do this in the case of chattels, by means of a sale under a writ of sequestration? Even if this be denied, it by no means follows that equity acts only *in personam.* If we recall that *in personam* means, in reference to procedure, nothing but bringing pressure to bear upon the defendant's physical person, it is clear that equity has done something which goes far beyond that. It has given the purchaser from the sequestrator: (1) full "equitable

[24]Daniell, Chancery Practice, *loc. cit.*

title" to the chattels; (2) possession of the chattels; (3) the right to use all the powers of the court of equity to protect the possession and "equitable title". As a consequence of the possession, the purchaser thus becomes, according to the common law, owner as against all the world except the defendant. On the other hand, the plaintiff, having received money, has, and may of course transfer, an indefeasible title to it, and is as well off as the judgment creditor in the legal action.[25]

May we not say, then, that in the fully developed system judgment at law and decree in equity for the recovery of a sum of money were, in spite of differences in their form, enforced in ways which were equally effective practically and between which there was very likely no fundamental difference in legal theory? This is not to say that the differences which did exist were not of importance, for they most certainly were. Procedure *in rem* may be regarded as the normal mode of enforcing a money judgment at law; procedure *in personam* the normal mode, historically,[26] of enforcing a decree in equity for money. But at law procedure *in personam,* (or at least not *in rem*) could be and was used in many cases; and in equity procedure not *in personam* (and which very likely really was *in rem*) could be used whenever the normal procedure *in personam* failed. At any rate, we must say that if the common law did not at times act *in personam* in enforcing money judgments, it is hard to say what *in personam* means;[27] and that if the chancellor did not at times act *in rem* in enforcing decrees for money, he gave so good an imitation of it that it can with difficulty be distinguished from the genuine article.

Today of course it is generally provided by statute or rule of court that on equitable decrees for money, execution shall issue as in similar cases at common law. The federal equity rule reads: "Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form

[25]If, as Professor Ames suggested, the court of law in detinue, when it sends the sheriff after property which is already the plaintiff's, is acting *in rem,* it seems that the court of equity does the same thing under sequestration, even if the purchaser does not get a legal title as against the defendant.

[26]This is not universally true to-day. See discussion, *infra.*

[27]In the entire comparison of law with equity, I have ignored entirely the extraordinary writs, such as mandamus, prohibition, habeas corpus, etc., in which, of course, the court of law acted *in personam* in every sense of the word.

used in the district court in suits at common law in actions of *assumpsit.*"[28]

In other jurisdictions the decree when entered or when filed with the clerk of the Supreme Court, is given the force, effect and operation of judgments at law. No attempt has been made by the present writer to determine with exactness how early such statutes were passed in each of the different jurisdictions, but some of them go back to a very early date. In 1799 the legislature of New Jersey, for example, enacted that "the decree of the Court of Chancery shall, from the time of its being signed, have the force, effect and operation of a judgment at law in the Supreme Court of this State, from the time of the actual entry of such judgment". This language was to some extent ambiguous, and accordingly there was some dispute as to its meaning and effect.[29] In 1839 the legislature provided for the filing of decrees made in the Court of Chancery in the office of the Clerk of the Supreme Court; and finally, to settle all doubts, it enacted that "all decrees and orders of the Court of Chancery, whereby any sum of money shall be ordered to be paid by one person to another, shall have the force, operation and effect of a judgment at law in the Supreme Court from the time of the actual entry of such judgment, and the Chancellor may order executions thereon as in other cases."[30] Under provisions of this kind, of course, there is no doubt that title passes upon the execution sale which takes the place of the sale under the writ of sequestration. This change in procedure has not, however, altered in any respect the fundamental character of either the primary right or the action; they are still *in personam* as much as ever. The change is in the method of enforcing the decree. As we have already seen, either procedure *in personam* or procedure *in rem* may be used to enforce judgments *in personam* at law; and the same is equally true of equitable decrees *in personam.*

With this change has come another: the abolition of imprisonment for debt. Express constitutional provisions of this kind exist in most of our States. All modifications, conditions and restric-

[28]Federal Equity Rule 8. This rule is carried over into the new rules from the old rules. See also Rule 90. Even if the decree be not solely for money but includes that, the *fi. fa.* may be used. Western Pocahontas Co. *v.* Acord (C. C. 1910) 178 Fed. 843. For the history of the English Law, showing that in 1838 the chancery court was given power to issue writs of *fi. fa.* and *elegit,* see Street, Federal Equity Practice, § 2197.

[29]Van Buskirk *v.* Muloch (1840) 18 N. J. L. 184.

[30]Mutual Ins. Co. *v.* Newton (1888) 50 N. J. L. 571.

tions upon imprisonment for debt provided by the laws of any State are by act of Congress applicable to process issuing from federal courts to be executed therein.[31] The effect of these provisions upon equitable decrees for the payment of money thus becomes a question, more especially in States in which execution may issue upon such decrees, but also in those still using sequestration. For example, if a particular provision be held to apply to an action for breach of contract at law, will it also apply to an equitable decree for money based upon the same contract? If the vendor (who has conveyed) in a suit at law for the purchase price cannot have execution against the person, can he (if he has not conveyed) get it by bringing a bill for specific performance? No attempt can be made to answer this question in detail here.[32] It must suffice to point out that it seems to be commonly held that these provisions apply not only to legal but to corresponding equitable actions.[33] To quote from the Pennsylvania court's opinion in the case cited in the last note: "The main object of the statute . . . was to relieve from imprisonment in all cases where no offense appears, except that of omitting to pay money due on a contract. . . . The power to imprison for the purpose of enforcing a decree for the payment of money due on a contract no longer exists." We have thus the interesting result, in States taking this view, that judgment at law and decree in equity for the payment of money, where the action is one falling within the scope of these provisions, are both enforceable only by procedure *in rem*.

Apparently the end of the evolution of equity along these lines, with its tendency to eliminate the differences between legal and equitable procedure where the end sought is the same—to obtain payment of a sum of money,—has not yet been reached. In most jurisdictions there is no statute which provides that the equitable decree shall in form be converted into a money judgment, but in spite of this there is evidence that this is happening in appro-

[31] 17 Cyc. 1491; U. S. Comp. Stat. (1901) 709; Freeman, Executions (3rd ed.) 2414, and cases cited.

[32] To attempt to do so is beyond the scope of this article, the sole object of which is to present an analysis of the powers of modern courts of equity as they exist, both in the absence of statutes and under typical modern statutes.

[33] *Ex rel.* Scott *v.* The Jailer (Pa. 1855) 1 Grant, 237; Blake *v.* State (1875) 80 Ill. 11; Herrington *v.* Cassem (1898) 82 Ill. App. 594; Barclay *v.* Barclay (1900) 184 Ill. 375; People *v.* Spier (N. Y. 1877) 12 Hun 70. Not all of these are decisions, but they show the law to be as stated. See also Freeman, Executions (3rd ed.) § 451.

priate cases, at least in jurisdictions having code procedure. In the case of *McMillan* v. *Barber Asphalt Paving Co.*, already quoted from,[34] the court, after finding that the specific relief asked for, by way of cancellation of the bond, could not be had, affirmed a money judgment for the value of the bond and in doing so gave utterance to the words quoted. In other words, if legal judgment and equitable decree for money are to be enforced in the same manner, there is no reason why a difference in form should be retained.

Although the supposed "fundamental difference between law and equity" has thus been abolished for this group of cases in which money judgments and decrees are sought, there remains in reality a difference which may fairly be called fundamental. In the case put, if the vendor has not conveyed, he can at law recover, not the purchase price, but only damages for the loss of his bargain;[35] but by appealing to equity he can get a decree for the purchase price, on condition, of course, that he execute a deed conveying the land to the defendant. At law, if the jury find, or it is admitted, that the contract was made and all conditions precedent and concurrent were complied with, the plaintiff is entitled to judgment for damages. In equity, however, other considerations are taken into account. We must first find that the property is of the kind required for specific performance—land, unique chattels, etc.; also that no consideration of the interests of third parties or of the public leads the court to keep its hands off. The equitable doctrine of lack of mutuality will still apply. If the bargain is oral, and so unenforceable at law because of the Statute of Frauds, the equitable doctrine of part performance will still govern in equity. If the parties reduce the oral bargain to writing—"integrate it", as Wigmore has taught us to say—and in so doing fail because of mutual mistake to embody the terms of the oral bargain correctly in the written contract, at law the parol evidence rule will doubtless in many cases prevent the mistake from being set up as a defence to the action for damages for breach of the written contract; but in equity the mistake may be set up in the answer

[34] *Supra,* note 1. *Acc.* Luetzke *v.* Roberts (1906) 130 Wis. 97.

[35] There are, of course, a few stray cases holding that the purchase price can be obtained in an action at law, usually no adequate reason being given; but this view is probably not law in more than one or two jurisdictions. In the case of personal property there is a doctrine which obtains at common law in a number of jurisdictions which really gives the seller of chattels the equivalent of specific performance. See Prof. Williston's article, 20 Harvard Law Rev. 363.

to the bill for specific performance.[36] The vendor may still have specific performance with abatement in price where there are defects in the quality or quantity of the *res,* even though at law there is a breach which prevents his suing for damages. Other differences could be mentioned, but time and space forbid. In other words, substituting procedure *in rem* by way of execution for procedure *in personam* by way of attachment for contempt does not in any way destroy the superior ethical character of equity as compared with the common law, and the discretion of the chancellor in granting or refusing relief still governs as much as it ever did.[37]

In our previous article we examined into the nature of the common law writ of partition and concluded that it was an action *in rem,* since the principal object of the action was to get at a specific *res* which defendant had; also that the judgment was *in rem,* in that it accomplished this object directly. We may now examine the bill in equity for a partition which took the place of the common law writ. The chancellor first awarded a commission to neighboring justices to determine how the land ought to be divided; then decreed the execution of mutual conveyances, not having the power by his decree to bring the result about directly. If the defendants refused to execute the conveyances, or if, after doing so, refused to surrender possession of any part to which they were not entitled, the chancellor would issue a writ of attachment, and if that were insufficient, a writ of sequestration, an injunction for the possession, and a writ of assistance directing the sheriff to put the parties into possession of their respective shares.[38] How does this differ from the common law action? The principal object of the action is clearly the same, to get at a specific *res* which defendant has. But the court of equity lacks the power to completely accomplish the object directly, since it can not pass the complete title by its decree or by virtue of anything its officers may do under the decree. It is therefore compelled to enter a decree ordering the execution of mutual conveyances. In our scheme of actions where shall we put such an action? Unlike the actions *in personam* thus far examined, the principal object is not to enforce a personal liability of the defendant; yet the decree is

[36]Fry, Specific Performance, c. XV, and cases there cited.

[37]Of course, attachment may still be used in cases where imprisonment is not abolished for the corresponding legal action, and in cases where defendant refuses to execute deeds, to refrain from acts when enjoined, etc.

[38]Carteret *v.* Petty (1675) 2 Swanst. 323, note (a).

not directly *in rem, i. e.,* it does not vest title in the plaintiff; nor will any proceedings taken under it by officers of the court have that effect, at least not to the same extent as the common law procedure. It will be shown later, however, in connection with decrees against vendors of land for specific performance of contracts to convey, that the proceedings under the decree do ultimately, irrespective of what the defendant may do, have an effect which can only be described by calling it *in rem.* Can we say the decree is merely *in personam*? In form it is in a sense *in personam,* that is, it is a personal order to the defendant to do an act. But our classification is not based upon form alone, otherwise no judgment at law would be *in personam.*[39] Judgment *in personam,* as we have used it thus far, means a judgment of such character that by means of it the plaintiff can, as a means of attaining the principal object of the action, subject the general assets of defendant, as distinguished from some specific property interest, to the payment of his claim; and, in addition, or in lieu thereof, in some actions imprison the defendant until he pays—the imprisonment being thus a means of getting payment from defendant's general assets. Now the decree is not *in personam* in that sense. It orders the defendant to do an act, to convey a specific property interest—and imprisonment under the decree is merely a means of getting at this specific property interest; and the writs of sequestration and assistance have the same purpose. However, the decree does result incidentally in the enforcement of a personal liability if defendant is fined and imprisoned for not conveying. In this sense and to this extent, therefore, we may call the decree *in personam.* On the other hand, the proceedings under the decree are of varying character. In so far as the defendant's person is imprisoned in order to induce him to act, they are *in personam.* In so far as chattels are sequestered and sold to satisfy any fine imposed, they are *in rem* in the sense already discussed in connection with money decrees. The proceedings under the writ of assistance, by means

[39]This might well have been discussed in the first part of this article, but it seemed better to leave it for discussion here. The common law judgment always reads as though the plaintiff were recovering a specific thing or *res* belonging to him: "it is considered by the court that the plaintiff do recover" his damages, his debt, his possession, etc. Prof. Ames did well to emphasize this difference in form, and the effect which the change of emphasis due to the fact that the equity decree was in form *in personam,* had upon the character of equitable doctrines as compared with the common law. But a difference in form, important as it may be, cannot be regarded as fundamental except as it corresponds to substance.

of which the plaintiff is put into possession of the land though without acquiring a complete title to it, are most certainly not *in personam* in any sense of the word, and must be called *in rem,* as will be discussed more fully later on.

How shall we classify an action of this kind? Its object is that of an action *in rem., i. e.,* to get at a specific *res* which defendant has, and not to enforce a personal liability. To accomplish this the court of equity has to enter a decree in the form of an order *in personam,* ordering the doing of an act. The proceedings under the decree are, however, in part *in personam* and in part *in rem.* It is clear that in so far as the decree and proceedings under it are *in personam* in the sense above indicated, a statute authorizing constructive service against a non-resident would be invalid, *i. e.,* to the extent that it purported to empower the court on such service to enter a decree under which the defendant could be punished for contempt, such a statute could not be enforced,[40] but it would on the other hand undoubtedly be valid to the extent that it authorized on such service procedure *in rem, e. g.,* either putting the plaintiff into possession, as is done by the writ of assistance, or the more complete relief of vesting full title in him. To classify properly an action of this kind is difficult. From the point of view of the principal object, the real purpose, of the action,—the basis of classification we have thus far followed—it is *in rem.* For reasons familiar to all of us, connected with the historical development of equity, the decree has to be in form a personal order addressed to the defendant, and the proceedings under the decree are in part *in personam* (the defendant is imprisoned or subject to personal liability by way of fine), and in part not *in personam* (his general assets are sequestered, and sold if necessary to pay fine and costs, and possession of the land is given to the plaintiff). If we adhere to the basis of classification we have thus far followed, we shall say the action is *in rem,* though we shall of course not fail to notice how the object of the action is accomplished by a proceeding in form *in personam.* If by statute we endow the court—as is generally done today—with power by its decree, or action taken by its officers under the decree,[41] to vest full title in the plaintiff without calling on the defendant to do anything, the action becomes in substance identical with the

[40]State *v.* Nathans (1896) 49 S. C. 199, 225.

[41]In Hart *v.* Sansom (1884) 110 U. S. 151, the court said that this would still be acting *in personam.* This, of course, is so obviously untrue as to need no discussion.

old common law action, the only difference being that it is carried on in equity according to equity procedure without a jury. No one would then hesitate to call it an action *in rem*. But by such a change the real object of the action is not in any respect altered; the means of accomplishing the object have merely been simplified and rendered more certain of accomplishing their purpose. A more complete discussion of this will be given below, in connection with bills for specific performance.

A consideration of bills in equity for the specific performance of contracts for the conveyance of interests in land, the vendor being the defendant, will throw additional light upon this problem of classification. We can not compare such actions with any corresponding actions at law based upon contract, for the only remedy at law is by way of the enforcement of a personal liability for damages. Doubtless the action in equity is commonly thought of as brought for the enforcement of a personal duty to convey, and from some points of view this is doubtless true. But a consideration of what, in the absence of a statute, the chancellor really does in the developed equity system will suggest a different view. Of course he could not, any more than in the partition case, vest a complete legal title in the plaintiff.[42] As in the partition proceeding, he had to content himself in the first instance with entering a decree in form *in personam, i. e.,* a personal order to defendant to convey the land and to surrender possession to the plaintiff. If defendant refused, he could be attached for contempt. After getting out the attachment, the plaintiff could sue out a writ of injunction for the possession and then a writ of assistance, directed to the sheriff of the county where the land lay, commanding him to put the plaintiff into possession of the premises in question, pursuant to the decree.[43] Sequestration could also be used to induce defendant to execute the deed if he still refused, as well as, of course, to secure payment of any fine for contempt and of costs if awarded.

How does an action of this kind differ from a bill in equity for partition? In substance, that is so far as the principal object of the action is concerned, it seems, not at all. The principal object of the action in each case is to deprive the defendant of a specific *res* which he has, and not to enforce a personal liability.

[42]The history of the development in the federal courts of equity will be discussed later. See note 52.

[43]2 Daniell, Chancery Practice (2nd ed.) 1280; 1 Spence, Equity Jurisdiction, 392.

The court of equity, however, again lacks the power completely to accomplish the object directly. It accordingly enters a decree, in form *in personam* (in the sense previously indicated); and proceeds to enforce this decree by procedure which is, in part, *in personam* (*i. e.,* the defendant is imprisoned), but which is in part not *in personam,* (*i. e.,* the sheriff is directed to put plaintiff into possession, and perhaps also to sequester property of defendant). If we follow the suggestion made above with reference to the equitable action for partition, we shall say that this action is in form *in personam* but in substance *in rem.* As before, we find the procedure under the decree to be not entirely *in personam.* When the chancellor by the writ of assistance directs the sheriff to put the plaintiff into possession, he can not be described as acting *in personam* in any sense in which that phrase can fairly be used, and it was suggested above that such procedure is really *in rem.* In discussing writs of assistance, an eminent writer in a passage, a part of which has already been quoted, says:

"After all, these are scarcely exceptions to the rule that the chancellor has no jurisdiction *in rem.* When he issues and enforces a writ of sequestration, or a writ of assistance, he merely exerts physical power over the possession of property, and this he can do, though he have no jurisdiction whatever *in rem.* A court which possesses that jurisdiction can by its judgment or decree take the title to property out of one person and put it into another."[44]

Now it must be noted, as previously pointed out, that the learned writer here uses "jurisdiction *in rem*" as synonymous with "power to create and extinguish title". This is of course very much in accord with our discussion of the phrase down to this point. However, the reader will recall that the Roman law use of the term in connection with actions was pointed out in Part I, and in that connection reference was made to the fact that Professor Langdell himself, following this, classified ejectment and replevin as actions *in rem,* since in them the plaintiff sought to recover a specific *res* belonging to him and not to enforce a personal liability against the defendant. But by means of a writ of assistance a plaintiff in equity in a proper case may obtain possession of property. If, in pursuance of the decree, the defendant has already conveyed the title, but refuses to surrender possession, the physical *res* of which the plaintiff obtains possession, is his, as in ejectment;

[44]Langdell, Summary of Equity Pleading (2nd ed.) 35, note 4.

if the conveyance has not been made, the *res* is (at law) the defendant's but (in equity) ought to be the plaintiff's. In this connection it may not be amiss once more to call attention to Professor Ames's statement concerning the action of the court of law in detinue:

"The common law acts *in rem*. The judgment in detinue is, accordingly, that the plaintiff recover the chattel or its value."[45]

If by directing that the plaintiff recover possession of a physical *res* and by issuing execution directing the sheriff to put the plaintiff into possession of the same, the common law court, in ejectment, replevin and detinue, is acting *in rem*, can we say that because the form of the decree is *in personam*, the court of equity is acting merely *in personam* when ultimately, though perhaps not in the first instance, it issues a writ directing the sheriff to put the plaintiff into possession? Must we not broaden our definition of *procedure in rem* to include proceedings which through an officer of the court put some one out of and another person into possession of a specific physical *res*? Certainly such procedure is not *in personam*.

It must be noted that it was not necessary actually to imprison the defendant before the writ of assistance could be had, and in the developed system of equity, it seems that not only was a plaintiff who wanted possession of land, and who had obtained a decree against the defendant for delivery of the same, not required to proceed *in personam* against the defendant; he was forbidden to do so. In *May* v. *Flook*,[46] after a decree directing defendant to deliver possession of land to plaintiff, the writ of execution of the decree was served, and, defendant not obeying, an attachment for contempt was issued against him and he was imprisoned. This was held to be an erroneous procedure, and he was discharged out of custody and given costs. A writ of injunction for the possession was then issued and served, after which the writ of assistance directed to the sheriff was issued to put plaintiff into possession. Defendant then sued plaintiff at law for assault and false imprisonment, all of which had taken place under the apparent authority of the attachment. Plaintiff applied to the court of equity to stay the legal proceedings, and on his "submitting to make the

[45]Lectures on Legal History, 76.

[46](1772) 2 Sim. *407; 1 Jac. & W. 663. The latter report contains the order for defendant's discharge from custody and the order referring to a Master the question of defendant's damages for imprisonment.

defendant such satisfaction for his imprisonment as should be approved of by the master" the action at law was stayed and the matter referred to a Master. In other words, the form *in personam* is retained, but in fact procedure *in personam* is not only not required, it is forbidden. In observations submitted to the Lord Chancellor, John Dickens, senior register of the Court of Chancery, said: "There are instances in which attachments *are not to be executed*: One . . . is, the attachment that is issued for not obeying a writ of execution of an order, to deliver possession of land, which is merely for the purpose of obtaining an order, for an injunction to enjoin the party to deliver possession". In other words, getting out the process as though procedure *in personam* was to be used has become a mere formality, which must be gone through with before procedure *in rem* can be had.[47] Must we not modify the usual statements, such as:

"If a court of equity decides that the defendant in a suit ought to . . . deliver property to the plaintiff, it does not render a judgment that the plaintiff recover . . . the property, and then issue a writ to its executive officer commanding him to enforce the judgment; but it commands the defendant personally to . . . deliver possession of the property, and punishes him by imprisonment if he refuse or neglect to do it."[48]

Of course this prohibition of procedure *in personam* applied only to cases where procedure through the sheriff was feasible, as in the case put of decrees for possession; in fact it seems to have been limited to such decrees; and in specific performance cases, defendant could be attached for contempt and imprisoned for the failure to execute the deed. To describe the writ of assistance as "a last resort" as some writers do, or to say, as the same writers do, that "the chancellor could only enforce his orders and decrees

[47] *Acc.* Dove *v.* Dove (1783) 2 Dick. 617, 618; 1 Cox Ch. 101; Green *v.* Green (1828) 2 Sim. *394. On the necessity for suing out and serving an injunction for possession, before a writ of assistance could be had, see Striblet *v.* Hawkie (1744) 3 Atk. 275.

[48] Langdell, 1 Harvard Law Rev. 117. The form of the proceeding is correctly described, but not the substance. The careful preservation of the form after the substance has departed is very misleading, as May *v.* Flook shows. Decree, writ of execution, attachment, injunction for possession—all point to procedure *in personam*. They are, in fact, in this group of cases mere formalities leading up to the process *in rem*—the writ of assistance. The result was a common-sense one, and to be expected. The chancellor saw the sheriff putting plaintiffs-in-ejectment into possession every day, and it was natural that he should adopt this procedure in place of, and not merely in addition to, trying to make the defendant do it himself.

by process *in personam*", seems hardly a fair statement of what actually took place.[49]

Let us look at the matter from still another point of view. Consider for a moment the effect of this action of the court of equity, taken through its officer, the sheriff. By obtaining through the sheriff the possession of the land, the plaintiff disseised the defendant. He was then recognized by the common law court as being the owner of the land as against all the world but the disseisee. On the other hand, the defendant, being thus disseised, was not, according to the common law, owner against any one. So long as the disseisin lasted, the disseisee could not sue any one for interfering with the land in any way. All he had left at common law was a non-assignable chose-in-action, *viz.*, his power by entry or action to regain the seisin and so the title.[50] In other words, the court of equity, acting through its officer, without the cooperation and against the will of the defendant, created a state of facts to which the common law attached the legal consequences that the defendant lost his title, though he retained a common law power to regain it; while, on the other hand, the plaintiff gained a defeasible legal title. Can we fairly say that the court which in this manner brings to pass a state of facts which has these legal consequences is, in doing it, acting merely *in personam*? Compare the proceeding with a common law execution sale by the sheriff. The common law court through its officer creates a state of facts to which the common law attaches the legal consequence that title passes from the execution debtor to the purchaser at the execution sale. If all formalities have been complied with, the title in this case is indefeasible, but is not that, important as it is, the only substantial difference?

To-day of course by statute nearly everywhere the court of equity has been given power to pass the complete legal title to the plaintiff, either directly by its decree, or by the less direct but equally effective process of appointing a Master or some other person to execute a deed for, and in the name of the defendant. In England this was accomplished by Sir Edward Sugden's Act.[51]

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[49]See 2 Daniell, Chancery Practice, (2nd ed.) 1281, for the Statute of 1 Wm. IV, c. 36, § 15, rule 19, which did away with the necessity for obtaining all these preliminary writs and allowed the writ of assistance to issue as soon as proof was given that defendant had disobeyed the decree. Form was thus made (except as to the decree itself) to conform to substance.

[50]Ames, Lectures on Legal History, "Injuries to Realty", 224-230.

[51]2 Daniell, Chancery Practice (2nd ed.) 1279; Stat. 1 Wm. IV, c. 36, rule 15.

Similar legislation exists in nearly all the States, and in the federal courts Rule 8 of the new federal equity rules now covers the matter.[52] Under many such statutes the decree is still in form *in personam*—a personal order,—but by virtue either of the decree itself or the proceedings taken under it, the complete title passes to plaintiff. Doubtless under other statutes the decree may be in form either *in rem* (*i. e.*, it may purport itself to vest the title in the plaintiff) or *in personam,* or perhaps both. Under all of them the equitable action against the vendor for specific performance is clearly an action *in rem,* both as to its object and as to the effects of the decree and proceedings under it, and the same is true of the partition proceeding, as already indicated.

All actions against express or constructive trustees, the object of which is to obtain a conveyance of the legal title, are of course of the same character, and should therefore be classed as actions *in personam*—a personal order,— but by virtue either of the decree breach of trust, the action is an equitable action *in personam.*[54]

If the action for specific performance of a contract to convey land is an action *in rem,* it may be asked how it comes about that

[52]There seems to have been no statute or rule of court which authorized this procedure until a provision was inserted at the end of Rule 8 in the new rules. Apparently the federal courts of equity originally assumed and exercised this power without a statute or rule of court. The question might well be asked, even with a rule of court, what power has a court, authorized by statute to frame rules of procedure, to introduce a change of this kind, which involves conferring additional power on the court of equity, and not merely regulating the manner of exercising powers already possessed? Apparently in making the rule the Supreme Court thought of it as involving merely a matter of procedure.

[53]A constructive trust has been described as "merely a remedy". 27 Harvard Law Rev. 127, note. Perhaps what is meant is that the most conspicuous thing about a constructive trust is not the existence of the personal duties which play so large a part in express trusts, but the power over the *res.* In express trusts, in addition to the power *in rem,* the cestui may call upon the trustee for the doing of all kinds of acts and hold him personally liable if they are not done. These personal duties are very largely, though not entirely, absent in the case of constructive trusts.

[54]As suggested in the preceding note, there are some personal duties in the case of constructive trusts. In the case of an infant trustee, since he is not personally liable for breach of trust, it seems that he is not under a personal duty to the cestui; what the latter really has is a power over the *res.* If the *res* is exchanged by the infant trustee for another *res,* the court gives the cestui a similar power over the new *res.* Undoubtedly the infant would be restrained by injunction from destroying or dissipating the *res.* This raises an interesting problem, the discussion of which space forbids: How shall we classify equitable actions seeking injunctions to preserve a *res* for the plaintiff until such time as he is entitled to the *res* itself? They do not seek to enforce a personal liability, or, necessarily, to prevent a wrongful act, for in the case put, the infant is not personally liable if he does the act. They are therefore not actions *in personam* as we have defined them. May we not broaden our concept of actions *in rem* so as to include these?

if the court has jurisdiction of the parties it can and generally will, according to the settled principles of equity, decree specific performance even though the land be without the jurisdiction. The truth seems to be that this rule had its origin in the fact that the object of the action could be completely accomplished only by putting the decree into the form of an order *in personam,* and the argument was: in what we are doing, we are acting only *in personam*; we have jurisdiction of the parties, *i. e., in personam,* and therefore we can act. This was the form that the argument in fact took, and it ultimately prevailed.[55] This result was reached the more easily as there seemed to be nothing unfair about the proceeding, the defendant having had his day in court. As a matter of fact, if we analyze the situation, we find that from the legal point of view the *res* of which the plaintiff seeks to deprive the defendant in an action *in rem,* is not only the physical object but also the congeries of legal rights, privileges and other jural relations which go to make up title or ownership. This congeries of jural relations, not being a physical object, can not of course have any physical *situs.* We are perhaps (in the case of legal ownership) in the habit of thinking of it as being where the land is. There is no inherent reason for this, and in the case of personal property we perhaps often follow a different notion. From the nature of things the law of the jurisdiction where the land is must in the final analysis determine who is entitled to the possession and enjoyment of it, since its tribunals and officers are the only ones that can deal with the physical *res.* Admitting this, it by no means follows that there is any inherent reason why the law of the jurisdiction in which the land is may not be that the congeries of rights, etc., known as ownership or title, may be transferred by acts done without the jurisdiction, whether those acts be those of the owner himself or of a foreign legal tribunal or its officers. It is everywhere recognized that the owner's voluntary deed, even though executed and delivered outside the jurisdiction in which the land is, passes the title. The same deed executed under the duress of a foreign court of equity seems also to be recognized as having the same effect, although if exerted by some private person the same duress (imprisonment, actual or threatened) would affect the validity of the deed. To call such a deed voluntary is of course a plain misstatement of the facts, but we

[55] An interesting example of the same argument used in connection with the foreclosure of an equity of redemption in foreign lands is discussed below.

give effect to it as though it were voluntary.[56] As a matter of abstract logic, apart from legal precedent, there seems to be little real difference between recognizing the validity of a deed executed and delivered under the compulsion of a foreign chancellor and recognizing the validity of a deed executed in his name by a master appointed by the foreign court.[57] In any event, whatever the law may actually be upon this point, it is clear that the principal object of the action, even when brought for the conveyance of land outside the jurisdiction, is to deprive the defendant of a specific *res*, and an action of this kind is not an action *in personam*, if by that we mean an action to enforce a personal liability.

It may not be without interest to consider the proper classification of common law actions to recover possession of property which, as we say ordinarily, belongs to the plaintiff. It will be recollected that in Part I this question was raised and left open for discussion later. Let us examine the matter from the point of view suggested in connection with the discussion of writs of assistance. In ejectment the nominal object of the action is to put the nominal plaintiff into possession and to deprive defendant of it. The real plaintiff of course goes into possession with the assistance of the sheriff. By the action of the sheriff the defendant, who because of possession had title as against everyone except someone with a better claim, loses the title.[58] The real plaintiff by acquiring, or regaining, possession thus acquires or regains the title to the land. In other words, change of possession, as in the case of possession gained by the aid of the sheriff under the writ of assistance, results also in an alteration of the actual rights of ownership in the particular piece of land. Ejectment is therefore as much an action *in rem* as any other action, since its principal

[56]It is curious that there is so little discussion in the books of this question of duress by the chancellor. It would seem to have been a very obvious point of attack for the common law court in the days when the two courts were competing for jurisdiction. We treat as a man's deed an instrument about the wording of which he is not consulted and which he executes and delivers in preference to going to jail for the remainder of his life; and say that legal title passed because the defendant conveyed it to the plaintiff! We consider the distinction between this, and a deed executed by a Master, for him and in his name, as a very important matter. Aside from inherited prejudices, is there any very great difference between the two things?

[57]Of course, as the preceding note recognizes, our law has always drawn a distinction between these two things, although to-day by statute nearly everywhere either may be done, so far as domestic land is concerned. May we not expect the same thing to happen ultimately even where foreign land is concerned?

[58]See note 45, *supra*.

object is to enforce not a personal liability but a power over a *res* which defendant has. Any personal liability of the defendant for his dealing with the property is of course enforced at common law by either an action of trespass *quare clausum,* for the original disseisin if there were one, or an action of trespass for mesne profits. The real nature of the ejectment action is concealed both by the fictions in which the whole proceeding is clothed and by the usual discussion of the action, which ignores both the title which defendant because of his possession has, and also the fact that one disseised has at common law really no title but only a power to regain title.[59]

With some changes this discussion applies to replevin and detinue. The most important difference which must be noted is that, even though a chattel be in the adverse possession of another, who thus because of his possession is owner against "all the world except the real owner", nevertheless the latter has a true right *in rem* against people generally that they shall not unlawfully interfere with the chattel. Violations of this right *in rem* give rise to actions of trover or case, according to what is done.[60] Unlike the disseisee of land, the dispossessed owner of a chattel still has a true right *in rem*; but the wrongful possessor is also owner, just as in the case of land. As regards third persons who interfere with the chattel, each one may assert and prove ownership. When the sheriff replevies the chattel and turns it over to

[59]That there were at common law incidental proceedings *in personam* is admitted by all writers, but the number of instances of this kind of procedure seem to be understated. For example, they were not uncommon in ejectment. If the judgment and process were regular and plaintiff was put into possession and the judgment afterwards reversed, the possession was restored to the defendant by writ of restitution, a proceeding *in rem.* If, however, the process under the judgment was irregular, but plaintiff was put into possession under it before it was set aside, possession was restored to the plaintiff by procedure purely *in personam, i. e.,* the court ordered the plaintiff to surrender possession to defendant and attached him for contempt if he refused. See the form of the order in Doe d. Stephens *v.* Lord (1837) 7 A. & E. 610, 614. Proceeding through the sheriff, *i. e. in rem,* was not only not required, it was forbidden. Doe d. Williams *v.* Williams (1834) 2 A. & E. 381. Attachment for contempt was also used for non-payment of costs by a tenant who, after entering into the consent rule, refused at the trial to confess the lease, etc. Runnington, Ejectment, 415. If the defendant interfered with the sheriff while executing the writ for possession or later turned the plaintiff out of possession without relying on any new source of title, he was attachable for contempt. Runnington, Ejectment, 453; Kingsdale *v.* Mann (1703) 6 Mod. 27; see also Davies d. Povey *v.* Doe (1773) 2 W. Bl. 892.

[60]Pollock & Wright, Possession, 91-93; Whittier, Cases on Common Law Pleading, 189-194, and cases cited in the notes; Radcliffe & Miles, Cases on Torts, 318-319.

the plaintiff, the defendant's possessory title is destroyed, and this destruction becomes final if at the trial of the action judgment is for the plaintiff. An action of this character is fairly to be classed as *in rem* even though plaintiff already had a title, for the result is to extinguish the defendant's title and to enlarge the number of rights, etc., which compose plaintiff's title.[61] In the case of detinue the situation is somewhat more complex for the reason that the common law made no serious effort as it did in replevin to actually restore the chattel to the plaintiff. The judgment was in the alternative, that plaintiff recover the chattel or its value.[62] In so far as the recovery of the chattel is in view, the action is *in rem*; in so far as recovery of a personal judgment for the value of the chattel is in view, the action is *in personam*. This view of these common law actions is supported by the fact that in all of them constructive service against a non-resident defendant is permissible where the statute provides for it, in so far as they are *in rem* in the sense suggested, the physical *res* of course being in the jurisdiction. That is, statutes are valid which authorize the recovery on constructive service of the possession with the accompanying destruction of defendant's interest in the *res*; but in so far as these statutes attempt to permit the enforcement of a personal liability, either as a main object of the action, as in detinue, or as an incidental feature, they are invalid.[63]

In one of the passages quoted at the opening of Part I, the writer based the chancellor's lack of ability to act upon constructive service upon the alleged fact that equity acts only *in personam*.[64] As we have seen this statement is in substance incorrect; and, as a matter of fact, so far as many things the chancellor actually did were concerned, there was no inherent reason why he should not have acted upon constructive service. Undoubtedly the preservation of the form of the decree as *in personam* had much to do with the matter. However, constructive service is very largely if not wholly a creation of modern statutory law, for it seems to have been equally unknown in the common law actions. As in equity, to the extent that the common law actions, judgments and procedure were *in rem*, there was no logical necessity for the failure

[61]Of course, in such an action as replevin, there are incidental objects *in personam*. This is true of many actions *in rem* where there is a liability for costs, etc.

[62]Martin, Civil Procedure at Common Law, § 85.

[63]Cloyd *v.* Trotter (1886) 118 Ill. 391.

[64]15 Columbia Law Rev. 38.

to develop this power. Simply as a fact of history, neither tribunal seems to have developed the ability to do this, with the possible exception noted below. To see that this was not a necessary result in equity so far as the substance of things was concerned, but was due rather to the retention of the in many cases outgrown form of decree *in personam,* let us ask the question: On a bill for specific performance against a non-resident defendant, if the land was in the jurisdiction, so far as what the chancellor really did was concerned, what reason was there why equity could not have allowed the plaintiff to invite the defendant to come in by giving him actual notice, and then, if he did not come, have awarded a writ of assistance directing the sheriff to put the plaintiff into possession? If defendant ever came into the jurisdiction and sought to enforce his common law power to regain title, the chancellor would of course have to follow this up by enjoining the defendant from thus disturbing the plaintiff. Of course, as a matter of historical fact, no such development did take place in the case of land, but attention may now be called to the fact that the chancellor did this very thing, in the case of chattels, in one class of cases, *viz.,* in bills of interpleader. If the physical *res* was in the jurisdiction, as of course it had to be in interpleader, the plaintiff turned it over to the court and was permitted to maintain his bill even though only one of the claimants was in the jurisdiction and the others were non-residents. This was, for example, the case in *Stevenson* v. *Anderson,*[65] as all but one of the defendants were residents of Scotland and had not been served in England. In giving his decision Lord Chancellor Eldon said: "The plaintiff in a bill of interpleader against persons within and without the jurisdiction is bound to bring them all within the jurisdicton within a reasonable time; if he does not, the consequence is, that the only person within the jurisdiction must have that which is represented to be the subject of competition; and the plaintiff must be indemnified against those who are out of the jurisdiction, when they think proper to come within it. . . . If the plaintiff can show that he has used all due diligence to bring persons, out of the jurisdiction, to contend with those who are within it, and they will not come, the court, upon that default, and their so abstaining from giving him the opportunity of relieving himself, would, if they afterward came here and brought an action, order service on their attorney to be good service, and

[65] (1814) 2 Ves. & B. 407.

enjoin the action forever."[66] Obviously a court which acts merely *in personam* could not take such action, but it will be noticed that as against the absent defendants no action *in personam* of any kind is taken. The proceeding as between the defendants is *in rem* in the sense we have been using it. Consciously or unconsciously, we have here a development without statutory authority of an action *in rem* on constructive service, not by publication but by personal notice given to the non-resident absent defendant.

If space permitted, a very interesting comparison could be made between the proceedings in the peculiar common law action of replevin and those in equity for the specific restitution of a unique chattel which the defendant detained from the plaintiff. In the replevin proceeding if the defendant concealed the chattels, apparently pressure was brought to bear to induce him to produce them, first by taking chattels of his by way of counter-distress and eventually by way of attachment of his person.[67] The comparison between this and sequestration and attachment in equity is obvious. Of course in form legal writ and equitable decree differed—one was *in rem*, the other *in personam*—but under both we find analogous proceedings,—seizure of chattels, attachment of person, and delivery of the chattel in question by the sheriff if it can be found. The order in which these occur at law and in equity is, as one would expect, not the same, but the interesting fact is that all are present in both actions.

One of the most interesting examples of an equitable action *in rem* is the bill for strict foreclosure of an equity of redemption. Under the common law theory of mortgages as it existed in England, the mortgagee's legal title became absolute upon default by the mortgagor. To prevent the resulting injustice the chancellor endowed the mortgagor with an equity of redemption, and corresponding to this the mortgagee was given a bill to foreclose the equity of redemption. The essential part of the decree of strict foreclosure read as follows: "In default of the defendant's paying to the plaintiff the principal money, interest, and costs as aforesaid, by the time aforesaid, it is ordered and decreed that the said defendant do stand absolutely debarred and foreclosed of

[66] *Acc.* Martinius *v.* Helmuth (1815) Coop. 245. On the general subject, see 2 Daniell, Chancery Practice (2nd ed.) 1763.

[67] 3 Street, Foundations of Legal Liability, 209; 2 Roscoe, Real Actions, 650, 651. If defendant won at the trial, he was entitled to counter-distress and attachment for contempt if plaintiff made away with the goods so that the sheriff could not get at them. Martin, Civil Procedure at Common Law, § 356; 2 Roscoe, Real Actions, 650.

and from all equity of redemption of and in the said mortgaged premises."[68] The object of this action is obviously to cut off forever the mortgagor's equity of redemption, *i. e.*, to bring about the destruction of an equitable interest in land. No procedure *in personam* is attempted, nor is the decree even in form an order to the defendant to do anything. There is no attempt to enforce any personal liability or to do anything except deprive the defendant of his specific equitable interest in the land by destroying it. The decree itself, coupled with the final order entered confirming it if the defendant does not pay the amount due, operates *in rem* to extinguish this equitable interest of the defendant, and may be pleaded in bar to any future bill to redeem. In other words, the decree of the court of equity here has an effect upon an equitable property interest exactly analogous to the effect which the judgment of the common law court in partition proceedings had upon the legal property interests. The nature of the action and the effect of the decree appear most clearly if we suppose the defendant to be a transferee of the equity of redemption who has not assumed any personal liability. It is obvious that no action against him can be *in personam,* for there exists against him no personal liability to be enforced. What is asserted is a power *in rem,* exercised through the court, to deprive him of an equitable interest in the property in question. An equitable action for the strict foreclosure of a vendee's "equity of purchase" in land, where it is allowed,[69] is of the same nature. So are the decrees of strict foreclosure allowed in some of the "lien theory" mortgage States in the case of absolute deeds which are shown by parol evidence to be intended as mortgages.[70]

We are now in a position to consider the decision in the case of *Toller* v. *Carteret,*[71] to which reference has already been made. In that case strict foreclosure of an equity of redemption to land outside the jurisdiction was asked for and decreed. In the passage already quoted, Lord Keeper North held that since equity acts *in personam,* and the defendant was personally served within the jurisdiction, the court had power to act. When this same question came up later,[72] counsel for the defendant, in arguing against the

[68]2 Daniell, Chancery Practice (1st ed.) 643; (2nd ed.) 1204.

[69]Button *v.* Schroyer (1855) 5 Wis. 598.

[70]This is the rule in some States only; other lien theory States hold that although the deed is absolute in form the general legal title remains in the "mortgagor".

[71](1705) 2 Vern. Ch. 494.

[72]Paget *v.* Ede (1874) L. R. 18 Eq. 118.

jurisdiction of the English court of chancery, said: "We dissent from the proposition that a foreclosure decree is merely a personal decree. Inasmuch as it deprives the mortgagor of his estate . . . it is a direct proceeding *in rem.* . . . If the mortgagor does not pay . . . his equity of redemption will be divested and annihilated." This argument did not meet with the attention it deserved. How, it is submitted, can an intelligent decision in cases of this kind be rendered unless we notice the difference between enforcing a personal liability and depriving a defendant of a specific *res*? The *res* in question here is an equity of redemption in foreign land. In the case of an equitable interest in domestic land, the chancellor's decree and order of confirmation extinguish the interest. Has the chancellor the power to do this in the case of an equitable interest in foreign land? The decisions in the two cases assert that he has. Doubtless some courts would dispute it. As already suggested in the discussion of the transfer or extinction of legal interests, there seems to be no reason why to permit this is not a sensible system of law. If the chancellor be recognized as having this power, it should not be put on the ground that he is acting *in personam,* for that is untrue; but on the simple ground that since the congeries of rights and other jural relations which go to make up the equity of redemption need not necessarily be thought of as situated where the physical *res* is, there is no reason why the chancellor who has the defendant before him may not enter a decree, to which the law, both of the jurisdiction where the land is and of that where the decree is made, will attach the consequence that the equity of redemption will be destroyed. It is beyond the scope of this discussion to settle to what extent the rule laid down in *Toller* v. *Carteret* is law to-day in the United States; we must content ourselves with finding out what equity is really attempting to do in such a case.

It is interesting to compare the strict foreclosure in equity with a modern statutory foreclosure by sale. Here the object still is to enforce a power *in rem,* but in a different manner. In the so-called "common law" mortgage States, the *res* is the same as in the case just considered, but the effect of the proceedings is not merely to extinguish the defendant's equitable interest but also to vest in the purchaser at the foreclosure sale the legal interest of the plaintiff free from the defendant's equitable interest. In a "lien theory" State the *res* is the legal interest of the mortgagor, and the object is, not merely to extinguish it but to vest it in the purchaser, (free from any claim by the mortgagee to an interest

in it) in order to realize thereby a sum of money for the plaintiff. Assuming the defendant to be a transferee of the mortgagor who has not become personally liable for the mortgage debt, we see clearly that the action is *in rem*. Usually by statute the action for the enforcement of the personal liability, if it exists, may be combined with the foreclosure, the result being a deficiency decree or judgment.[73] If the mortgaged property be in more than one State, the questions raised by *Toller* v. *Carteret* appear. The usual method of avoiding them is by ordering the defendant to make a deed conveying the foreign land to the purchaser at the foreclosure sale, and to this deed made under the duress of the chancellor recognition seems generally to be accorded.[74]

All equitable actions to enforce equitable charges on land, including equitable mortgage vendor's (*i. e.*, grantor's) liens,[75] etc., are also obviously *in rem*, in so far as they enforce merely the equitable lien or mortgage; *i. e.*, in so far as no personal liability is enforced, but merely a power *in rem*.

In our scheme of equitable actions, where shall we place bills for the removal of cloud upon title? In the typical case the plaintiff seeks to deprive the defendant of a physical object upon which he bases the claim which the plaintiff alleges is not valid. The basis of the plaintiff's bill is that he owns the property and is in possession of it. He does not, therefore, wish to deprive the defendant of a specific *res*, if by that we mean an actual interest in the property. Neither, on the other hand, does he seek to enforce a personal liability—a power *in personam*—against the defendant. Apparently what he does seek is to deprive defendant of: (1) the physical object upon which he bases his claim; (2) any right to call upon the courts in the future to pass upon

[73]In some States (*e. g.*, Missouri) mortgages may be foreclosed either by bill in equity (or the code substitute for same) or by a statutory legal proceeding. In the former, no deficiency decree can be had, *i. e.*, the action is *in rem* only; in the latter, a deficiency judgment can be had, *i. e.*, the proceeding combines an action *in rem* with an action *in personam*. In some States specific performance in the proper sense is denied to the vendor of land, but he is given a decree: (1) that the land be sold; (2) if there be a deficiency, *i. e.*, if the amount realized does not equal the purchase price, costs, etc., he is given a deficiency decree for that. Such an action is both *in rem* and *in personam*, whereas the original equitable action by a vendor for specific performance is purely *in personam*.

[74]See 1 Ames, Cases in Equity, 23.

[75]What is commonly called a vendor's lien ought to be called, for the sake of clearness, the grantor's lien, as more than one writer has suggested, in order to distinguish it from the right of a vendor who has not yet conveyed, which is often also called a vendor's lien.

the validity of his claim.[76] The first object is accomplished by an order in form *in personam,* but this can of course be followed by sequestration, etc., as well as attachment for contempt. The second object is accomplished by the application of the doctrine of *res judicata,* a thing which will be discussed later. It seems that an action of this kind is substantially *in rem,* since it involves as the object of the action not the enforcement of a personal liability but rather depriving the defendant of a specific *res,*—the document of title on which he bases his claim, as well as his right as plaintiff to have the court pass upon his claim. Presumably if the document were in the jurisdiction, but the defendant, a non-resident, were outside, a statute authorizing constructive service and seizure of the document would be valid, but of course no personal judgment or decree, even for costs, could be entered.[77] To-day by statute a so-called action to remove cloud on title is allowed in many States on constructive service against non-resident absent defendants.[78] Usually the document on which the alleged invalid claim is based is in these cases not within the jurisdiction. An action of this kind seems to have as its sole object the second one of those above mentioned, *viz.,* to deprive the defendant of the right to call upon the courts at a later time to pass upon the validity of his claim. No personal liability can be enforced, even for costs. Inasmuch as this claim of the defendant relates to a physical *res* in the jurisdiction, such proceedings are held valid on constructive service. Consistently with our definition, we may say that this action is *in rem,* the *res* being however not an interest in the land but only the right to have the court hear his claim and pass upon its validity.[79] It may be well at this point to notice that in so far as the doctrine of *res judicata* applies, every action *in personam* has an incidental effect *in rem* of this same kind. This does not in

[76]Whether an equitable adjudication as to the legal title of property will make the matter *res judicata,* either in equity or at law, will be discussed later in Part III.

[77]Presumably to-day, though there seems little authority upon the point, a court of equity would not hesitate to send the sheriff after the documents if defendant refused to surrender them and they could be found in the jurisdiction.

[78]Arndt *v.* Griggs (1890) 134 U. S. 316; Dillon *v.* Heller (1888) 39 Kan. 599.

[79]In referring here to the "right to have the court hear his claim," the matter is looked at from the point of view of the duty of the court to hear him. From the point of view of the defendant in such a suit—the present plaintiff—it may, of course, not be a true right, but only a privilege and a power, which the plaintiff would possess.

any way affect the validity of our distinction, which is based upon the principal object of the action.

Bills for the cancellation of sealed obligations constitute another interesting group of equitable actions *in rem* in the sense in which we have defined the term. For example, consider the case of a sealed obligation obtained by fraud. The obligor who seeks cancellation in a jurisdiction where, as at common law, fraud is no defense in a legal action on the instrument,[80] is seeking, not to enforce a personal liability for the deceit, but merely to deprive the defendant of a specific *res* which he has, *viz.*, a legal right *in personam* against the plaintiff, which right the defendant by means of his fraud has acquired from the plaintiff. This bill, therefore, has for its object the surrender of a specific *res* which defendant has, and may be compared to a bill asking reconveyance of real property obtained by fraud. Of course under the historical chancery system the chancellor could not deprive the defendant of the *res* merely by decreeing that the obligation was cancelled and the decree was not in this form, but in that of an order that the instrument be delivered up to be cancelled. This did not affect the legal validity of the instrument.[81] But if by means of its officers the court of equity should deprive an obstinate defendant of the physical instrument itself—a thing which, it seems, no court of equity in modern times would hesitate to do, accustomed as it is to sequestration and writs of assistance—it would thereby bring it to pass that defendant would lose his legal right *in personam,* for without the physical instrument he could not recover.[82] Procedure of this kind would have to be classed as *in rem* in the same sense as the procedure under writs of assistance in the case of land.

If by statute or judicial legislation the fraud of the holder of the sealed obligation has become a legal defence, it is still the rule in many jurisdictions that the instrument will be ordered to be delivered up for cancellation, and in some jurisdictions similar relief is granted in the case of written simple contracts obtained

[80]As in the federal courts. Ames, Lectures on Legal History, "Specialty Contracts and Equitable Defenses", 104.

[81]J. R. *v.* M. P. (1459) Y. B. 37 Hen. VI, fol. 13, pl. 3; 1 Ames, Cases in Equity, 1. Whether this is so to-day will be discussed later in Part III.

[82]Equity first allowed one who had lost a sealed obligation to recover; finally, in modern times, the law courts adopted the same view. Ames, Lectures on Legal History, "Specialty Contracts and Equitable Defenses", 104. Undoubtedly a law court would not allow a recovery where equity had deprived the plaintiff of the instrument.

by fraud.[83] Here of course the effect sought is not to deprive defendant of an actually valid right *in personam* against the plaintiff, but the action is to be compared to the bill for the removal of cloud upon title. To deprive the defendant of the physical object which is the basis of his claim and also to make the matter *res judicata,* seem to be the objects of the action. There is no attempt to enforce any personal liability as the principal object of the action. Essentially, therefore, the action is *in rem.* Whether the decree itself may not to-day have an effect *in rem* is left for future discussion. If the instrument whose cancellation is asked be a negotiable instrument to which there exists a personal or "equitable" defence, the object of the proceeding for cancellation is not only to deprive the defendant of the physical instrument and his right to a hearing in court as plaintiff, but also to deprive him of the power which he possesses of negotiating it to a holder in due course, the result of which would be to vest in the latter a valid right *in personam* against the plaintiff. This of course is an action *in rem.*

Our discussion has not by any means exhausted the list of equitable actions, but limits of time and space forbid the consideration of others. Before closing this part of the discussion, however, a word or two may be said concerning the statements so often made that all equitable rights are rights *in personam*; that they *had* to be such because of the fact that equity acts only *in personam.*[84] In the light of our discussion, it seems that two things may be said of this statement: first, that the premise is untrue; second, that even if the premise were true, the conclusion would not follow. As to the first point, nothing more need be said; as to the second, if the conclusions reached in Part I are sound,[85] a better example of a simple *non sequitur* could hardly be asked for, provided those making these statements mean by right *in personam* and right *in rem* what is usually meant by those phrases. In justice to these writers it must again be emphasized that often they seem to mean something else. Professor Ames's use of the phrase *in rem* was presented briefly in Part I,[86] and it seemed to be quite different from that of most writers. Professor Langdell's statement that "if equitable rights were rights *in rem* they would follow the *res* into the hands of a purchaser for value and without

[83] The cases are collected in 2 Ames, Cases in Equity, c. VII.
[84] 15 Columbia Law Rev. 38.
[85] 15 Columbia Law Rev. 53-54.
[86] 15 Columbia Law Rev. 43.

notice" was referred to in the same connection and left for further discussion at this time. Apparently Professor Langdell, whose statements on this point are quoted with approval by Professor Maitland, means to deny the name right *in rem* to any right which is subject to the doctrine of *bona fide* purchase for value. Admitting the validity of this usage for a moment—though, as has been pointed out previously, current definitions and common usage do not so limit the phrase—two things must be said: first, it would not follow that all rights which are cut off by this doctrine of *bona fide* purchase for value are rights *in personam*; second, there is nothing about procedure *in personam,* whether it be in equity or at law, which requires it to be used only for the enforcement of rights *in personam* or rights not *in rem,* even using the phrase *in rem* in Professor Langdell's apparently limited meaning. On the second point, reference need only be made to the summary at the close of Part I;[87] and the first point has already been fully discussed earlier.[88] It must however be pointed out that any such restricted meaning of right *in rem* leads to the following conclusions: (1) If a chattel were sold in market overt, the *bona fide* purchaser for value would get a title good against the previous owner. Since there are an indefinite number of persons who may become purchasers in this way, it follows that the owner of a chattel at common law had not a right *in rem,* but only, (if rights not *in rem* are necessarily *in personam,* as seems to be so often assumed) a right *in personam.*[89] (2) The same argument may be repeated concerning ownership of chattels in England under the Factor's Acts, and in many States having similar legislation. The legal title is likely to be cut off by a sale made by one not the owner to a *bona fide* purchaser for value, hence the conclusion as above. (3) Under modern recording acts, if A convey Blackacre to B who does not record, undoubtedly title passes to B subject to a power in A to destroy B's title by conveying to a subsequent purchaser. If the latter falls within the provisions of the recording act, he acquires a title on complying with the act before B records his deed, and B's title is divested. Must we therefore conclude that by the first conveyance B got only a right *in personam* and not a right *in rem*? (4) In the case of money, an indefeasible

[87] 15 Columbia Law Rev. 53-54.

[88] 15 Columbia Law Rev. 42-43.

[89] This is the same argument applied to legal ownership of chattels that is used by a learned writer in 28 Law Quarterly Rev. 296, to prove that an equitable interest is merely a right *in personam.*

title to that may of course be passed by a thief. Has the owner of money not a right *in rem* and only a right *in personam*? (5) Ownership of mercantile specialties we usually think of as including not only the right *in personam* but also a right *in rem*, or title. If the negotiable instrument be payable to bearer, one who steals it can pass a valid title to a holder in due course. Following the line of argument used in the other cases, it follows that the owner of a negotiable instrument payable to bearer has no title in the sense of a right *in rem* but only a right *in personam*. (6) Finally the case of one wrongfully in possession of a chattel may be considered. He is owner against "all the world except the true owner", as we have already mentioned; but since his right is not available against everybody, it is not a right *in rem* if we follow the logic in question. It seems hardly necessary to say that a definition of these terms which leads to a classification of this kind is not only not helpful but confusing.

[TO BE CONCLUDED.]

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PRIVATE ACTION FOR OBSTRUCTION TO PUBLIC RIGHT OF PASSAGE.

II.

As to authority: first, as to a general answer to our main question; second, in regard to certain specific classes of cases. It should be said at the outset that, while an attempt has been made to refer to illustrative cases upon each important sub-topic, yet this article does not purport to give all the cases in point; much less to collect authorities which have only a collateral bearing.[64]

General tendency of English cases:

Two early cases in the Year Books do not seem entitled to great weight. The full reports of these cases are translated in the note below.[65]

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[64]We must eliminate various decisions based on collateral grounds, not affecting the main issue here.

Thus a court may refuse to exercise equity jurisdiction, without determining that there could be no remedy at law. See Morris & Essex R. R. *v.* Prudden (1869) 20 N. J. Eq. 530, Depue, J., 536, 537; and compare Bigelow *v.* Hartford etc. Co. (1842) 14 Conn. 565.

So, municipal corporations may escape liability, where an individual defendant might have been held liable. In several jurisdictions it has been held that counties, towns, etc., are not liable at common law for damage due to failure to keep highways in repair. They are not held in the absence of a statute imposing liability. See Holman *v.* Townsend (Mass. 1847) 13 Metc. 297; Brown *v.* Watson (1859) 47 Me. 161, 164; Gold *v.* Philadelphia (1886) 115 Pa. 184, 197-198; Baxter *v.* Winooski Turnpike Co. (1849) 22 Vt. 114, Bennett, J., 123-125.

[65]For the following translations from the Year Books, we are indebted to Prof. Joseph Warren.

Y. B. 5 Edw. IV, Hil. pl. 24.

"If there be a common way, and it is not repaired, so that I am damaged by the miring of my horse, I shall not have any action for that against him who ought to repair the way, but that is a popular action, in which case no single man will have an action for it, but it is an action by way of presentment, noted by Heydon, etc. 34 E. III. ca. 8, otherwise 27 H. 8. 36. 32. etc."

Y. B. 27 H. VIII, M. pl. 10.

"A certain person brought an action on the case against another, Submitting that where the plaintiff has been accustomed to have a road from his place as far as a close, etc., by the royal way to carry and recarry, etc., (and) there the defendant has stopped the Royal way, so that the plaintiff can not go into his place, etc., to the aforesaid close, he has tort to his damage. Baldwin. It seems that this action does not lie for the plaintiff on the stopping of the high way; for the King has the punishment of that, and it will be presented in the Leet, and there it will be redressed because it is a nuisance common to all the liege men of the King, and therefore there is no reason that a particular private individual will have an action for it; for by the same reason that that person shall have an action for it, by the same reason everyone will have

In the English cases decided between 1665 and 1867, the plaintiff has generally prevailed, whenever, under a sufficient declaration, he has proved actual damage to himself.

This includes the following decisions:

Maynell v. *Saltmarsh* (1665) 1 Keb. 847.
Hart v. *Basset* (1682) T. Jones, 156.
Jeveson v. *Moor* (1697) 12 Mod. 262; s. c. 1 Ld. Raym. 486.[66]
Chichester v. *Lethbridge* (1738) Willes, 71.[67]
Rose v. *Miles* (1815) 4 M. & S. 101.
Greasly v. *Codling* (1824) 2 Bing. 263.

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an action for it, and then he will be punished 100 times for the same case. Wherefore etc. Fitz Herbert to the contrary. And I fully agree that every nuisance done in the royal way is punishable in the Leet, and not by action unless it be (a case) where a man has greater hurt, or annoyance, than anyone has, and there he who has greater inconvenience or hurt, can have an action to recover his damages which he has by reason of this special hurt. For example, if one digs a ditch across the high way and I come riding along the way in the night and I and my horse are thrown into the ditch so that I am greatly damaged and inconvenienced therein, I shall have an action in this case against him who made this ditch across the way because I am more damaged thereby than anyone else; so here the plaintiff had more enjoyment of this high way than anyone else had and therefore when it is stopped he has greater damage because he has no other way thence to his close. Therefore it seems to me that he will have this action for this special matter; but if he did not have greater damage than anyone else then he will not have an action."

In Pollock on Torts (6th ed.) 387, note *J*, the learned author's note on the case in 27 Henry VIII begins thus: "Action for stopping a highway, whereby it seems the plaintiff was deprived of the use of his own private way abutting thereon (the statement is rather obscure)." The Pollock note, after quoting Fitzherbert, ends:—"Held that sufficient particular damage was laid." Compare 1 Street, Foundations of Legal Liability, 224-225.

The decision in 5 Edw. IV, unless defended on the ground that there is no liability for mere omission to repair, seems inconsistent with the now generally admitted doctrine that a plaintiff can recover for damage due to contact of his horse with obstructions in the way.

In 27 Henry VIII, the judges were unable to agree. Pollock seems to understand that the obstruction was upon that part of the highway which abutted on the entrance to plaintiff's private way; and thus had the effect of blocking immediate access from the private way to the highway and *vice versa*. We shall deal later with the distinction between an abutting landowner's private right of getting from his land on to the highway, and his right, as a member of the public, to travel along the highway after he has once got upon it.

[66]The Court of King's Bench was equally divided on this case; but upon reargument before the justices of the Common Pleas and the barons of the Exchequer, they were all of opinion for the plaintiff.

[67]It has sometimes been thought that the true ground for maintaining this action was because the defendant in person prevented the plaintiff from removing the obstruction. See argument in Winterbottom *v.* Lord Derby (1867) L. R. 2 Exch. 316, 319.

Wilkes v. *Hungerford Market Co.* (1835) 2 Bing. N. Cas. 281.[68]

In four early English cases (cited in the note below) where the plaintiff failed, there were fatal defects in the declaration. These cases are "warnings to pleaders".[69]

We have been speaking of the general drift of English authority up to 1867. In that year two cases were decided;[70] one of which was at first regarded in some quarters as revolutionary. Both these cases will be stated and commented upon later. We shall then attempt to show that the scope and effect of the *Ricket Case* has been very much overestimated; and that the *Winterbottom Case,* as to the principal point there decided, is erroneous. Neither decision is likely to make any lasting change in English law as to the points now under discussion.

As to the general tendency of American authority.

Here there is more conflict than in England. While a private action is sometimes denied, yet it is sustained in many cases. But there has been a strong tendency to give exceptional reasons for sustaining the action, instead of attempting to evolve and state a general principle. And in some States there is an inclination to construe very strictly statutes giving a right to damages in cases of discontinuance, change, or vacation of a highway.

If, in considering the cases decided in favor of the plaintiff, we look solely at the facts of each case, we should regard these decisions as establishing the general principle that, so far as the requirement of damage is concerned, actual damage is sufficient ground to support an action. But judges, in giving their opinions, have laid stress upon special circumstances in the particular instance which tend to make out a particularly strong case of actual damage. Readers of these opinions have sometimes thought that these special circumstances were regarded by the judge as forming the sole basis for his decision. The effect has sometimes been to minimise the importance of the decision. There has been a pro-

[68]If Hubert *v.* Groves (1794) 1 Esp. 148, is not reconcilable with the later cases of Rose *v.* Miles, and Greasly *v.* Codling, it must be regarded as overruled by them.

[69]Anonymous (1584) Moore K. B. 180, par. 321; Fineux *v.* Hovenden (1599) Cro. Eliz. 664; Pain *v.* Patrich (1692) Carth. 191; Stone *v.* Wakeman, Noy, 120.

[70]Ricket *v.* Metropolitan Ry. (1867) L. R. 2 H. L. 175; Winterbottom *v.* Lord Derby (1867) L. R. 2 Exch. 316.

pensity in some quarters to assume that recovery is permissible only in certain exceptional situations (only as to certain classes of damage); and to regard the specific instances where recovery has been permitted as constituting an arbitrary limit to the right of action. This restricted view seems to us entirely erroneous.

The general drift of American decisions can best be gathered from the discussion, soon to be entered upon, of "authority in regard to certain specific classes of cases".

Some points, however, may be noted here.

Two of the States which go farthest in opposing the private action are Massachusetts and South Carolina.[71]

Among the States where, at least, *some* of the decisions strongly support the private action, are Maine, New York, Pennsylvania, and Washington (in its later decisions).[72]

The most valuable extended American opinion, from our point of view, is that of Brown, J., in *Piscataqua Nav. Co.* v. *New York, N. H. & H. R. R.* (D. C. 1898) 89 Fed. 362; affirmed, except as to a single item of damage, in (C. C. A. 1901) 108 Fed. 92. The learned judge considers and satisfactorily answers some of the leading arguments often urged by defendant against the maintenance of a private action in this class of cases.[73]

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[71]For some prominent Massachusetts cases, see: Proprietors of Quincy Canal *v.* Newcomb (Mass. 1843) 7 Metc. 276, 283; Smith *v.* Boston (Mass. 1851) 7 Cush. 254; Harvard College *v.* Stearns (Mass. 1860) 15 Gray, 1; Willard *v.* Cambridge (Mass. 1862) 3 Allen, 574; Blackwell *v.* Old Colony R. R. (1877) 122 Mass. 1; Stanwood *v.* Malden (1892) 157 Mass. 17; Nichols *v.* Richmond (1894) 162 Mass. 170; Robinson *v.* Brown (1902) 182 Mass. 266; Dwyer *v.* New York, etc., R. R. (1911) 209 Mass. 419.

For South Carolina cases, see: Carey *v.* Brooks (S. C. 1833) 1 Hill Law, 365; Steamboat Co. *v.* Railroad Co. (1888) 30 S. C. 539; Steamboat Co. *v.* Railroad Co. (1895) 46 S. C. 327; Cherry *v.* Rock Hill (1896) 48 S. C. 553.

[72]See Brown *v.* Watson (1859) 47 Me. 161; Dudley *v.* Kennedy (1874) 63 Me. 465; Tuell *v.* Inhabitants of Marion (1913) 110 Me. 460; Pierce *v.* Dart (N. Y. 1827) 7 Cow. 609; Lansing *v.* Wiswall (N. Y. 1848) 5 Den. 213; Wakeman *v.* Wilbur (1895) 147 N. Y. 657; Hughes *v.* Heiser (Pa. 1808) 1 Bin. 463; Philadelphia *v.* Collins (1871) 68 Pa. 106; Philadelphia *v.* Gilmartin (1872) 71 Pa. 140; Knowles *v.* Penn. R. R. (1896) 175 Pa. 623; Sholin *v.* Skamania Boom Co. (1909) 56 Wash. 303; Ingalls *v.* Eastman (1910) 61 Wash. 289.

[73]A draw in defendant's bridge over a navigable river fell, the fall being due to defendant's negligence; the channel was obstructed by the fallen draw. It was *held,* that the owners of a vessel detained by the obstruction could maintain an action for damages sustained by reason of the delay. The court, after coming to the above result on general principles, further said (p. 365) that the defendants could also be held liable for breach of special duty imposed by the statute which authorized the construction of the bridge.

The best short statement of American law, from the same point of view, is contained in the following *dicta* of Chancellor Walworth, in *Lansing* v. *Smith* (N. Y. 1829) 4 Wend. 9, 25:

Walworth, Chancellor. "If the defendants had erected these temporary bridges,[74] and were not authorized to do so, they might be indicted for a common nuisance. But the bridges might also be more injurious to some persons than to others. In such a case, if a person has sustained actual damage by the erection of the nuisance, whether direct or consequential, I am not prepared to say he cannot maintain an action against the wrong doer. If he sustains no damage but that which the law presumes every citizen to sustain, because it is a common nuisance, no action will lie. But the opinion I have formed on this point is, that every individual who receives actual damage from a nuisance may maintain a private suit for his own injury, although there may be many others in the same situation. The punishment of the wrong doer by a criminal prosecution will not compensate for the individual injury; and a party who has done a criminal act cannot defend himself against a private suit by alleging that he has injured many others in the same way, and that he will be ruined if he is compelled to make compensation to all."

As to the weight of authority in regard to certain specific classes of cases:

For convenience of consideration, the cases may be roughly divided into two large classes, each of which must, in their turn, be subdivided.[75]

Class 1. Where damage is claimed for pecuniary loss due to inconvenience or inability of passing and repassing by plaintiff himself, without regard to any estate he may have.[76]

Class 2. Where plaintiff owns land adjacent to a public way, and claims that his position as an adjacent owner is a material element in sustaining his action.[77]

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[74]The learned Chancellor had previously said that there was no evidence to justify a finding that the defendants had erected the temporary bridges.

[75]Judge E. H. Bennett's classification in 19 Am. L. Reg. [N. S.] 624, has been followed to some extent. A single case may sometimes include claims under more than one class.

[76]In some cases of this class the plaintiff may, in fact, be an owner of land abutting on the way, but he does not now contend that such ownership is an essential element in favor of allowing his action, or that it affects the amount of damage recoverable therein. Plaintiff does not now claim that the obstruction has depreciated the salable, rentable, or usable value of his real estate.

[77]He may contend that, in certain cases, his position as an adjacent owner entitled him to sue without having to prove actual damage. Or, while admitting that in certain cases he must prove actual damage, he may contend that his position as an adjacent owner is material to be considered in determining whether he has in fact sustained actual damage.

As to questions arising under Class 1.

There is absolute unanimity in favor of recovery in one class of cases; *viz.*, where, without fault on his part, the plaintiff, or his tangible chattel, has been damaged by contact with an unlawful obstruction. And it is said to be no objection that a considerable number of persons suffered in the same way from the same cause.[78] These conclusions are entirely right; although, if such questions were to arise now for the first time, they might, perhaps, be disputed by some courts. But this case of contact was put as an illustration of actionable damage in one of the earliest discussions of this topic,[79] and has gone unquestioned ever since.

Efforts have been made to show that the allowance of a private action in the case of damage done by physical contact with the obstruction is consistent with the denial of such an action in the case where the obstruction causes delay or hindrance to the prosecution of a business enterprise, and thereby involves pecuniary loss.

Two explanations have been suggested. First: that there is an intrinsic difference in the legal nature of the damage suffered in the two cases. Second: that there is a material difference in the nature of the right violated in the two cases.

As to the first explanation: It is said that, in the case of contact, the damage to the plaintiff is "peculiar and special damage, not common to the public"; whereas, in hindering the use of the highway for business purposes, the damage is "not in its nature peculiar or specific", but "common and public."[80] Our answer to this view has already been given, in the discussion *ante* of the phrases "special", or "peculiar damage".[81] Where pecuniary loss results, the damage to a man's business is just as important and specific as the damage to his body in case of harmful contact. And damage of the former description may be quite as prejudicial as damage of the latter.[82]

As to the second explanation: In *Swain* v. *C. B. & Q. R. R.* (1911) 252 Ill. 622, 626, 627, Vickers, J., says in substance, that

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[78]As to the last statement, see Stetson *v.* Faxon (Mass. 1837) 19 Pick. 147, 160; and Avery, J., in Farmers', etc., Mfg. Co. *v.* Albemarle, etc., R. R. (1895) 117 N. C. 579, 587.

[79]Y. B. 27 Hen. VIII, 27, pl. 10.

[80]See Shaw, C. J., in Smith *v.* Boston (Mass. 1851) 7 Cush. 254, 255-256.

[81]See *ante*, pp. 9-13.

[82]See Best, C. J., Greasly *v.* Codling (1824) 2 Bing. 263, 265; Brown, J., Piscataqua Nav. Co. *v.* New York, N. H. & H. R. R. (D. C. 1898) 89 Fed. 362, 363.

delay of a person having occasion to pass on business, though resulting in loss of time and of business engagements, is merely an injury to his public right (to his right as one of the public) to use the street. But he says that, in the case of falling into the trench, "the injury to the person and property is a direct trespass upon the individual, and invades his personal and individual rights," and a recovery is sustained "on the ground that his personal individual rights, other than his right to use the highway, have been invaded."

It is submitted that the above reasoning confuses two very different things: *viz.*, (1) the nature of the duty violated by an obstruction of the highway (or, looking at it from another point of view, the nature of the defendant's tort); and (2) the nature of the damage to the plaintiff, resulting from the defendant's tort. In each of the cases now under consideration, the same duty was owed by the defendant to the plaintiff; namely, a duty that he must not, by obstructing the way, cause damage to individuals rightfully using the way. The difference lies in the character of the damage which the plaintiff suffers in consequence of the defendant's tort. In each instance, it is damage of a nature which the law will notice and for which it will afford redress. The plaintiff has an interest in having his body and his tangible chattels unharmed by wrongful contact. But he also has an interest in having his business undertakings free from pecuniarily damaging interference by tortious conduct.

Is a private action maintainable where a plaintiff's *performance of a contract* is prevented, or made more expensive, by an obstruction in a public way?

The authorities are not unanimous; but the weight of authority is decidedly in favor of allowing an action. The action has repeatedly been maintained where the contract did not provide for a penalty on the plaintiff in case of non-performance; though when the contract *does* contain such a provision, courts sometimes emphasize that feature.[83]

[83]For cases allowing action, see: Dudley *v.* Kennedy (1874) 63 Me. 465; Knowles *v.* Pennsylvania R. R. (1896) 175 Pa. 623; Milarkey *v.* Foster (1877) 6 Ore. 378; Sholin *v.* Skamania Boom Co. (1909) 56 Wash. 303; Tuell *v.* Inhabitants of Marion (1913) 110 Me. 460; Commissioners of Anne Arundel County *v.* Watts (1910) 112 Md. 353.

For cases against allowing action, see: Plewes *v.* Hall (1869) 29 U. C. Q. B. 472; Carey *v.* Brooks (S. C. 1833) 1 Hill Law, 365 (a case where plaintiff had contracted to deliver under a penalty).

Suppose that a plaintiff, though not under a contractual obligation to any one, is engaged in a business undertaking, and its progress is completely prevented, or rendered more expensive, by an obstruction in a public way; thus, in each instance, involving pecuniary loss to the plaintiff. Why should not he have an action just as much as the man who is prevented from performing a contract? He may encounter more practical difficulty in satisfactorily establishing the fact of his pecuniary loss. But if he succeeds in proving that fact, how does his case differ in principle from the former? While there is some conflict of authority, the weight is decidedly in favor of recovery.[84]

Is a private action maintainable, unless the plaintiff was obstructed while actually using, or attempting to use, the public way?

That may depend on whether the plaintiff knew that the obstruction existed and that the way was thus made impassable. If he can satisfy a jury, (1) that he had this knowledge, and (2) that he would have attempted to pass but for this knowledge, he ought not to be deprived of his action merely because he did not make

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[84]American authorities in favor of recovery: Hughes *v.* Heiser (Pa. 1808) 1 Bin. 463; Wakeman *v.* Wilbur (1895) 147 N. Y. 657; Farmers', etc., Mfg. Co. *v.* Albemarle, etc., R. R. (1895) 117 N. C. 579; Carl *v.* West Aberdeen, etc., Co. (1896) 13 Wash. 616; Ingalls *v.* Eastman (1910) 61 Wash. 289; Mehrhof *v.* Delaware etc. R. R. (1888) 51 N. J. L. 56; Little Rock etc. R. R. *v.* Brooks (1882) 39 Ark. 403; Philadelphia *v.* Collins (1871) 68 Pa. 106; Philadelphia *v.* Gilmartin (1872) 71 Pa. 140; Gallagher *v.* Philadelphia (1897) 4 Pa. Super. Ct. 60, 61, 67; Brown *v.* Watson (1859) 47 Me. 161; Viebahn *v.* Commissioners of Crow Wing County (1905) 96 Minn. 276 (practically overruling 42 Minn. 532).

In the following case, where plaintiff recovered, the obstruction was in violation of a statute imposing a penalty if cars stood on a track more than five minutes. Patterson *v.* Detroit etc. R. R. (1885) 56 Mich. 172. And see 26 Iowa 377.

Authorities against recovery: Crook *v.* Pitcher (1884) 61 Md. 510; Jones *v.* St. Paul etc. R. R. (1896) 16 Wash. 25. (This last decision is practically overruled in 56 Wash. 38.)

Suppose that a physician, on his way to visit a patient, is inconvenienced and delayed by an obstruction in a highway. Can he maintain an action? We should say yes, if he thereby suffers pecuniary damage; *e. g.* through loss of time. There are *dicta* to the contrary in two American cases. See Eakin, J., 50 Ark. 83, 88; and Hoadly, J., in 2 Disney, 516, 542-543. In Boyd *v.* Great Northern R. R. [1895] 2 Ir. 555, a physician was delayed twenty minutes at a level railroad crossing by the gates being shut; the failure to open being due to the negligence of the railroad servants. This obstruction we take to have been in violation of a statute. See 6 B. & S. 709, 717-718. The court found that plaintiff sustained pecuniary damage from the delay, estimated at ten shillings. Plaintiff had judgment for that sum, and costs. Andrews, J., p. 557, regarded the plaintiff as having "suffered thereby some appreciable damage peculiar to himself beyond that suffered by other members of the public ordinarily using the highway."

an attempt which he knew would be unavailing. The defendant, who tortiously created the obstruction, ought not to escape compensating the plaintiff, because the plaintiff did not go through an idle ceremony.[85]

The authorities are not unanimous.

In judicial opinions, stress is sometimes laid upon the fact that, in the case before the court, the plaintiff, when delayed or stopped by the obstruction, was actually using the way and making an attempt to pass over it.[86] But judges who emphasize this fact do not thereby necessarily affirm that an actual attempt to pass is always indispensable to the maintenance of an action. The proven fact that plaintiff made an attempt relieves him from the burden of proving a sufficient reason for not making it. But omission to make the attempt is not, *per se,* conclusive against plaintiff's recovery.

The general view we have taken is sustained by *Dudley* v. *Kennedy* (1874) 63 Me. 465; where defendant, on p. 466, made the point that the plaintiff "did not load his boat and attempt to use the river; he only lost an abstract right to use it." This objection did not prevail.[87]

The contrary view is supported by *Burton* v. *Dougherty* (1879) 19 N. Brunsw. 51; and by the majority decision in *Powell* v. *Bunger* (1883) 91 Ind. 64. In the opinion in *Baxter* v. *Winooski Turnpike Co.* (1849) 22 Vt. 114, language is used favoring the view that an actual attempt to pass is an essential requisite to a private action. But the actual decision was based upon other points. See Bennett, J., pp. 123-125.[88]

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[85]If it be true, not only that a plaintiff did not attempt to pass over an obstructed road, but also that he had no occasion to pass over it, of course he cannot maintain an action for the obstruction thereon. See Appleton, J., in Brown *v.* Watson (1859) 47 Me. 161, 162.

[86]See Chichester *v.* Lethbridge (1738) Willes, 71; Hughes *v.* Heiser (Pa. 1808) 1 Bin. 463, 468-469.

[87]See also Knowles *v.* Pennsylvania R. R. (1896) 175 Pa. 623; Burrows *v.* Pixley (Conn. 1792) 1 Root, 362, 364; *cf.* Wicks *v.* Ross (1877) 37 Mich. 464.

[88]There is another class of cases where a plaintiff would often have difficulty in inducing a jury to find that, but for an obstruction in a public way, he would probably have attempted a certain line of business. After an obstruction of a permanent nature has been created, a plaintiff alleges that he now desires to inaugurate a new enterprise or to resuscitate an old one, and that he is prevented from taking such a step solely by reason of the obstruction. Some courts are inclined to summarily dismiss such a claim, without submitting to a jury the question as to what the plaintiff probably would have done, if it had not been for the obstruction. An illustration is afforded by Clark *v.* Chicago & N. W.

Can a private person recover for pecuniary loss or expense incurred in removing an unlawful obstruction in a public way; either for time spent in removal or for money paid to accomplish that end?

Yes—if, at the time of removal, the plaintiff had occasion to use, and was actually attempting to use, the public way for legitimate purposes beneficial to himself; and if the obstruction really interfered with his right of passage.[89]

No—if, at the time of removal, the plaintiff had no occasion or desire to use the public way for any legitimate purpose beneficial to himself.

It is not enough that the plaintiff, having no interest except as a member of the general public, desires to test the legality of the obstruction. He cannot constitute himself a champion of the public for that purpose. He cannot claim pay for removing an obstruction which was theoretically damaging to the rights of the public, but which did not cause any actual damage to him individually.[90]

The foregoing distinctions go far to diminish the seeming conflict among the decided cases; and appear fully to justify the result reached in *Pierce* v. *Dart* (N. Y. 1827) 7 Cow. 609, and in *Lansing* v. *Wiswall* (N. Y. 1848) 5 Den. 213; where the expenses of removal were held recoverable from the obstructer.

In *Carey* v. *Brooks* (S. C. 1833) 1 Hill Law, 365 (one judge dissenting), recovery was refused. And in *Steamboat Co.* v. *Railroad Co.* (1888) 30 S. C. 539, it was held that plaintiffs

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R. R. (1888) 70 Wis. 593. See also 32 N. Y. Supp. 590, 592; *cf.* 76 Iowa 165, 168; 252 Ill. 622, 628; 37 Mich. 464.

One reason for sustaining a demurrer to the complaint in the Wisconsin case was, that the damages alleged "rest entirely in contemplation". At the present time damages may be recovered, in various actions, for loss of future profits reasonably to have been expected in an established business which was wrongfully interfered with. But there is a strong disinclination to allow recovery for expected profits in a new business venture, which defendant wrongfully prevented plaintiff from inaugurating. See 1 Sedgwick, Damages (9th ed.) §§ 182, 183. Undoubtedly there are cases where a judge would be justified in ruling that there is no evidence on which a jury could reasonably find it probable that plaintiff, but for an obstruction in a public way, would have engaged in a new enterprise and would have acquired property thereby. But it may be doubted whether it is advisable for courts to establish an arbitrary rule that the question of probable future conduct can *never* be submitted to a jury.

[89]As to the last clause, see Waddell *v.* Richardson (1911) 17 Brit. Col. 19, 20; and Piggott, Torts, 162.

[90]Bidinger *v.* Bishop (1881) 76 Ind. 244; Hitchner *v.* Richman (1907) 74 N. J. L. 234.

could not recover for the expense of refitting, or rebuilding, their steamboats so as to admit of their passing under a bridge which was an unlawful obstruction.

Recovery was denied in *Winterbottom* v. *Lord Derby* (1867) L. R. 2 Exch. 316; a decision sometimes cited in good text-books as if it settled the law on this subject, but which seems to us erroneous. Kelly, C. B., who delivered the principal opinion, appears to overlook the distinction above suggested, and also to misapprehend one of the exact questions raised by the pleadings and evidence. He is very much influenced by the fear that a contrary decision would involve danger of a multiplicity of actions.[91]

We agree that a person having no interest except as a member of the general public, cannot sue to recover the expense incurred by him in removing an obstruction. But that was not the situation occupied by the plaintiff in the case then before the court. The plaintiff, in his declaration, alleged (*inter alia*) that defendant obstructed a public footway, that plaintiff was thereby hindered and prevented from passing along and using the footway; and was obliged to incur expense in removing the obstructions, "in order that he might and before he could pass and repass over and along the said footway, and use the same in and about his lawful business and affairs, and was greatly hindered and delayed in and about the same." Plaintiff obtained a verdict, at a trial upon an issue joined on defendant's plea of not guilty. Plaintiff proved that the footway was the shortest and most convenient way from his house to Prestwich; that he had been in the habit of using it; and that, while attempting to use it he was obstructed and delayed whilst persons, at his expense, removed the obstructions.

[91]Extracts from Kelly, C. B., L. R. 2 Exch. 316, 321, 322: "If we were to hold that everybody . . . who choses to incur some expense in removing it, might bring his action on the case for being obstructed, there would really be no limit to the number of actions which might be brought." "In this case . . . I think that to hold the action maintainable would be equivalent to saying it is impossible to imagine circumstances in which such an action could not be maintained." If this sort of damage is recoverable, "anybody who desires to raise the question of the legality of an obstruction has only to go and remove it, and then bring his action for the expense of removing it." If a person removes the obstruction, "he only incurs an expense such as any one who might go to remove the obstruction would incur. The damage is in one sense special, but it is, in fact, common to all who might wish, by removing the obstruction to raise the question of the right of the public to use the way." To say that "a person who thinks fit to go and remove the obstruction" can maintain an action "would really in effect be to say that any of the Queen's subjects could."

We think that the damage thus incurred by the plaintiff in removing the obstruction is "special" and "peculiar" to him, in the strongest sense of those terms. When the plaintiff has removed the obstruction and has incurred loss or expense thereby, no one else can sustain the *same* loss or expense from the *same* cause. Before the removal, many other travellers, if delayed by the obstruction, might have had an equal right with the plaintiff to attempt to remove it. But after the obstruction has been once removed by the plaintiff, it is impossible that other persons should subsequently remove it. True, the defendant may re-erect another obstruction in its place; but this (even though composed of the former materials) is a new obstruction. A fresh offense has been committed by its erection; and the removal of the second obstruction is an act entirely distinct from the removal of the first. If a defendant chooses to re-erect an obstruction after each removal, he cannot escape making compensation for the expense of each removal, on the ground that this would result in a multiplication of suits for the same cause. A suit for the expense of removing a later obstruction would not be for the same cause as a suit for the exepense of removing an earlier obstruction. It would be for a new and distinct cause.

Class 2. Where plaintiff owns land adjacent to a public way, and claims that his position as an adjacent owner is a material element in sustaining his action.[92]

Under this head an adjacent landowner sometimes claims that he has a "private right", over and above the right of passage which pertains to him as a member of the general public. Strictly speaking, the question of the existence or nature of the alleged "private right" does not fall within the scope of the present article, which relates to the "obstruction of a public right of passage over a public way." But it is difficult to deal effectively with the action for interference with the public right unless we first consider the question as to the alleged private right of an adjacent landowner. Indeed, unless we know what is claimed or conceded as to such "private right", it is almost impossible to get at the

[92]He may contend that, in certain cases, his position as an adjacent owner entitled him to sue without having to prove actual damage. Or, if he admits that in certain cases he must prove actual damage, he may contend that his position as an adjacent owner is material to be considered in determining whether he has in fact sustained actual damage.

gist of various reported decisions. Hence a brief consideration will be given here to questions arising as to the alleged "private right" of an abutting landowner or riparian proprietor.

Two very different private rights are claimed in behalf of the abutting landowner.

The first is, a right of immediate access from his abutting land to the public way, or from the public way to his adjacent land (sometimes spoken of as the right of immediate ingress and egress).

The second is, a right, over and above that of the members of the general public, to travel along the public way after he has once got upon it.[93]

The existence of the first alleged right is generally admitted.

In regard to the second, there is more controversy.

As to the first: If there is an obstruction upon that part of the public way which abuts on plaintiff's land, and it may materially impede the plaintiff's immediate access from his land to the public way, or *vice versa*, a private right of the plaintiff has been infringed.[94]

The plaintiff may sue without having to prove actual damage.[95]

These positions are fully sustained by English authority.[96]

It is no defense that the obstruction in the public way does not extend to the entire frontage of plaintiff's lot; or that the

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[93]Compare the second and third classes in Judge Bennett's classification: 19 Am. L. Reg. [N. S.] 624.

[94]It has been said that the abutter's special right of access to and from that part of the highway which adjoins his lot is "a property right", just as much as his right to the lot itself. It might be safer to say that this special right has, for purposes of enforcement, the attributes of a property right: (1) so long as the way in question continues to be a public way; and (2) when the alleged obstructer is not acting under valid authority from the State. In the Solicitor's Journal, of January 11, 1913, Vol. 57, p. 184, there is an article on "A Frontager's Right of Access to the Highway," questioning the strict accuracy of the word "Right".

As to the right of the government to improve a navigable water way, without making compensation to a riparian owner whose access from his land to the river is thus impaired, see: United States *v.* Chandler-Dunbar Water Power Co. (1913) 229 U. S. 53; and compare conflicting view in 1 Farnham, Waters, 382, 383.

[95]Salmond, Torts (1st ed.) 269, § 91, par. 2; Pollock, Torts (6th ed.) 397-398.

[96]Rose *v.* Groves (1843) 5 M. & G. 613; Page-Wood, Q. C., Attorney General *v.* Conservators of the Thames (1862) 1 Hem. & M. 1, 31-35; Lyon *v.* Fishmongers' Co. (1876) 1 App. Cas. 662. See, especially, Lord Cairns, pp. 675-676, and Lord Selborne, pp. 681, 684-685; Salmond, Torts (1st ed.) 269-270, § 91.

plaintiff has an unobstructed access to his lot from other streets on other sides of his lot.[97]

As to the existence of the first alleged private right, American authorities go at least as far as the English.[98]

As to the second alleged private right:

Should the law, besides recognizing the abutting landowner's private right to get from his land on to the highway and *vice versa*, also recognize in him an additional private right, over and above the right pertaining to him as a member of the general public, to travel along the highway after he has once got upon it?

English authority answers in the negative. After he has once got upon the public way, he has only such right of travel along it as is common to him and the rest of the public. His right to travel on the way (his right to get to and from his land by going along the highway) is not superior to that of a non-landowning member of the public.[99]

Many American authorities appear to recognize the existence of the second private right; so far as relates to public *land* ways.[100]

The authorities as to the existence or recognition of the alleged second "private right" may be summed up as follows:

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[97]See Rorison *v.* Kolosoff (1910) 15 Brit. Col. 26; Randolph, Eminent Domain, § 410; Winslow, J., 121 Wis. 7; 18 Ky. L. Rep. 989, 990; Monks, J., Martin *v.* Marks (1900) 154 Ind. 549, 556.

For a different view, see the opinion of a very able judge, Mr. Justice Wardlaw, in McLauchlin *v.* Railroad (S. C. 1850) 5 Rich. Law, 583, 591.

[98]See, for instance, Brayton *v.* Fall River (1873) 113 Mass. 218; French *v.* Connecticut River Lumber Co. (1887) 145 Mass. 261. For an early statement, see argument for plaintiff in Harrison *v.* Sterret (Md. 1774) 4 Harr. & M. 540, 550. It would seem that Harvard College *v.* Stearns (Mass. 1860) 15 Gray, 1, might well have been decided for plaintiff upon this ground. See 19 Am. L. Reg. [N. S.] 630.

[99]See Buckley, J., in Chaplin *v.* Westminster Corporation (1901) 85 L. T. N. S. 88, 89; s. c. L. R. [1901] 2 Ch. 329. Salmond, Torts (1st ed.) 269-270, § 91, par. 3. Lyon *v.* Fishmongers' Co. (1876) 1 App. Cas. 662, Lord Cairns, 671. For some expressions of similar views by American judges, see Black, C., 91 Ind. 64, 68; dissenting opinion of Clark, J., 126 N. C. 897, 904-905.

[100]"According to the better view, as it seems to the writer, the private right of access is the right, not only to go from one's property to the street and from the street to the property, but also to use the street in either direction as an outlet to the general system of highways. This right extends at least to the next intersecting street." 1 Lewis, Eminent Domain (3rd ed.) § 191.

In some cases it is not easy to determine whether the decision in favor of an abutting landowner was based upon the infringement of a supposed special right of the landowner, or upon actual damage sustained by the plaintiff while in the exercise of a right he shared in common with other members of the public.

It is not recognized in England, either as to public land ways or public water ways. We prefer the English view.

We do not understand that it is generally recognized in the United States as to public water ways.

In regard to public land ways, it is recognized in the United States as to highways established by dedication, where lots and streets have been platted and sales of lots made according to the plat.[101]

There is a conflict of authority in the United States, where a highway has been established by condemnation. The majority view in such cases seems to recognize the alleged second private right.

Assuming that the first private right has not been infringed (*i. e.* that there is no obstruction on that part of the public way which abuts on plaintiff's land), and that the second private right is not recognized, what are the requisites to an action by an abutting landowner who complains of an obstruction to a right of passage belonging to him as a member of the public?[102]

The answer, in general terms, is: The same requisites that exist in an action by any other member of the general public.

We believe that, in the above enumerated classes of cases, an abutting landowner, who meets an obstruction while travelling on a part of the public way not adjacent to his land, cannot recover unless he sustains actual damage therefrom.[103] His action cannot "be based on higher or other ground than would be that of any one of the public" using the way and sustaining actual damage. Any other member of the general public (although not a landowner) has an equal right to sue if he, in his turn, sustains actual damage from the same obstruction. Where an

[101]In our newer States, in the establishment of streets in cities and villages, a particular method of dedication has been almost universally pursued. It may be (somewhat loosely) described as Dedication by Platting and Sale. This special method of dedication is not so common in England and in some of our older States. This difference in the method of establishing highways may largely account for unwillingness to recognize the existence of the alleged second private right. As to this particular method, see: 3 Dillon, Mun. Corps. (5th ed.) §§ 1083, 1084, 1086, 1087, 1090; 1 Lewis, Eminent Domain (3rd ed.) § 198; 1 Elliott, Roads and Streets (3rd ed.) §§ 128, 132, 165.

[102]This inquiry includes substantially all English cases; all American cases as to public water ways; and American cases as to public land ways laid out by condemnation, in those States which refuse to recognize the second private right in this class of ways.

[103]Actionable damage is not confined to damage due to physical contact with the obstruction. It would include damage due to prevention or delay in the performance of a business undertaking.

abutting landowner complains of the obstruction of the public right of passage at a point where the public way does not abut upon his land, it is incumbent upon him, just as much as upon any other plaintiff, to prove actual damage to himself. But, as a practical matter, we believe that a landowner is more likely to sustain actual damage than a non-landowner; and that it will often be much easier for the former to prove that he has sustained such damage. Ownership of abutting real estate "would obviously be an important element in the question whether special damage had in fact been sustained. . . ."[104]

In *Ryerson* v. *Morris Canal & Banking Co.* (1903) 69 N. J. L. 505, 507, 508, Pitney, J., said that, viewing the plaintiff (an abutting owner) "simply as a property owner", there might be difficulty in holding the damage to him sufficient to form the basis of a private action. "But", he added, "the present declaration exhibits the plaintiff in the capacity of a member of the public entitled to use the obstructed highway, who, by reason of special circumstances, had need to use it more frequently than others, and who sustained actual pecuniary loss because of being compelled to take a roundabout route in order to avoid the obstruction."[105]

In favor of recognizing the alleged second private right, it is sometimes urged that an obstruction upon a part of the highway which is not adjacent to plaintiff's land may as effectually prevent the beneficial use of his land (may as completely destroy its value) as an obstruction upon the part of the highway directly abutting upon his land.[106]

This is true. But it does not follow that it is necessary to invent or assert a special right in the landowner, in order that he may obtain compensation for his actual loss. The rejection of the erroneous tests of difference in kind and peculiarity of the damage, and the substitution of the correct test of actual damage, will enable the landowner to recover compensation. And this

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[104]Compare Sir Montague E. Smith, in Bell *v.* Quebec (1879) 5 App. Cas. 84, 100; and Brown, J., in Piscataqua Nav. Co. *v.* New York, N. H. & H. R. R. (D. C. 1898) 89 Fed. 362, 364. And see Moss, J. A., 25 Ont. App. 251, 259.

[105]See Maynell *v.* Saltmarsh (1665) 1 Keb. 847; Rosekrans, J., Milhau *v.* Sharp (1863) 27 N. Y. 611, 627-628.

[106]See Angellotti, J., Cushing-Wetmore Co. *v.* Gray (1907) 152 Cal. 118, 123; Fell, J., *In re* Melon Street (1897) 182 Pa. 397, 403-404; Whitfield, C. J., Shoemaker *v.* Coleman (1909) 94 Miss. 619, 623; Osler, J. A., Drake *v.* Sault Ste. Marie etc. Co. (1898) 25 Ont. App. 251, 257.

result will be brought about without giving the landowner an unfair preference over a non-landowning member of the public, who has also sustained actual damage from the same obstruction. Each of these parties will be entitled to recover if, and only if, he proves actual damage to himself from an obstruction of the right of passage to which he is entitled as a member of the general public.

Whether a landowner has suffered actual damage from an obstruction located on that part of a public way which does not abut upon his premises, might seem to be a pure question of fact, as to which there need be no special rules of law. But there has been a tendency to establish hard and fast rules of law as to when a landowner can maintain an action. And, among the courts which incline to establish definite rules on this subject, there is some conflict as to what those rules should be.

There are four questions whose discussion has occupied a good deal of space in the reports. The first has been practically answered in a previous part of this paper. The other three remain to be briefly considered.

1. Does the fact that any other landowner actually suffers, or is liable to suffer, damage of a similar character to that sustained by the plaintiff constitute a fatal objection to recovery by plaintiff?

This is part of a broader question considered in an earlier part of this article (see 15 Columbia Law Rev. 18-23); and it has there been virtually answered in the negative. The correctness of this answer will be assumed in discussing the remaining three questions.

2. When is an action maintainable for totally or partially cutting off the connection of the landowner with the general system of public ways? How complete must be the deprivation of such connection? How serious must be the difficulty of making such connection?

3. What, if any, arbitrary tests as to the existence of causal relation between the obstruction and the damage to the individual landowner?

4. Does loss of business constitute a legal element of damage to a landowner from the obstruction of a public way?

As to Question 2.

There is pretty general agreement that an action lies where the obstruction completely cuts off the connection with the general

system. If the obstructed public way is a land way, it would generally be held that an action lies.[107] This is the rule even in Massachusetts,—a State conspicuous for narrowly restricting private actions.[108]

Suppose that the obstructed public way is a *water* way, and that the obstructions (while not interfering with immediate access from plaintiff's land to the water) completely cut off all connection, by travel along the water way, between plaintiff's land and the general system of water ways; especially connection with the ocean, the great public water highway of the world. No good reason is perceived why an action should not lie, the same as in the case of a land way; and there is authority to that effect.[109]

But there are authorities which deny liability in some cases of this description. This result is apt to be based on the alleged reason that the plaintiff's damage did not differ in character from that which was actually sustained, or was liable to be sustained, by some other member of the general public. This reason seems to us insufficient, for grounds heretofore stated.[110]

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[107]We do not suppose that a defense could be based upon the fact that there was a public *water* way left open to the plaintiff.

[108]Putnam *v.* Boston & Providence R. R. (1903) 182 Mass. 351, 354. See 1 Lewis, Eminent Domain (3rd ed.) § 204.

[109]Drake *v.* Sault Ste. Marie etc. Co. (1898) 25 Ont. App. 251, Moss J. A., 260-261. Hickok *v.* Hine (1872) 23 Ohio St. 523; Burrows *v.* Pixley (Conn. 1792) 1 Root, 362; Chatfield Co. *v.* City of New Haven (C. C. 1901) 110 Fed. 788.

[110]As to authorities denying liability in such cases:

A strong instance is Blackwell *v.* Old Colony R. R. (1877) 122 Mass. 1. See also O'Brien *v.* Railroad (1845) 17 Conn. 372; and Seeley *v.* Bishop (1848) 19 Conn. 128; but compare comments in 2 Wood, Nuisance (3rd ed.) § 694. See further, Whitehead *v.* Jessup (C. C. 1893) 53 Fed. 707 (opposed to the great weight of federal authority); Small *v.* Grand Trunk Co. (1857) 15 U. C. Q. B. 283; Archibald *v.* Queen (1893) 3 Can. Exch. 251, affirmed (1894) 23 Can. Sup. Ct. 147; Allen *v.* Board of Chosen Freeholders (1860) 13 N. J. Eq. 68; Carvalho *v.* B. & J. Turnpike Co. (N. Y. 1900) 56 App. Div. 522, affirmed 173 N. Y. 586.

It has been asserted that the Massachusetts decision in Blackwell *v.* Old Colony R. R. "is followed" in Frost *v.* Washington County R. R. (1901) 96 Me. 76. But this is an error. In the Massachusetts case, the alleged unlawfulness of the obstruction was admitted by the demurrer to the declaration, and yet the remedy by action was denied. In the Maine case, the decision for defendant was based upon the ground that the obstruction must be regarded as "a lawful obstruction"; having been expressly declared to be so by an Act of the U. S. Congress. The Maine court held, that, under the commerce clause of the United States Constitution, Article 1, Section 8, Paragraph 3, Congress has the power in the interests of commerce to authorize the obstruction and even closing of the navigation of a tide-water channel or cove. And it was also held, that this can be done without making compensation to one owning land adjacent to the cove, whose business and whose landed property are seriously damaged by the closing.

Suppose that obstructions on a public way cut off, in most directions, connection, by travel along the way, between plaintiff's land and the general system of public ways; but that there is an outlet left in a single direction.

There is a conflict of authority.[111]

In Massachusetts and some other States no action lies, even though the effect of such obstructions is to depreciate the value of plaintiff's land. See *Cram* v. *Laconia* (1901) 71 N. H. 41. The tendency in those States is to hold that depreciation of value cannot be regarded as special damage to the plaintiff, if any other landowner suffers, or may suffer, in the same way.[112]

In some other States an action lies if the obstruction has the effect of depreciating the value of the land.[113] And, in at least one State, Alabama, it would seem that the action lies in that case only. If we understand the Alabama decisions aright, no kind of damage other than depreciation of value will sustain an action by a landowner in that State.[114]

Some courts even though there is no depreciation in land value,

[111]See authorities collected in 1 Lewis, Eminent Domain (3rd ed.) § 202; and in 21 Am. & Eng. Encyc. of Law (2nd ed.) 714, n. 6.

[112]See 21 Am. & Eng. Encyc. of Law (2nd ed.) 714, n. 6.

[113]See 1 Lewis, Eminent Domain (3rd ed.) § 354, especially page 646.

[114]Compare Walls *v.* Smith (1910) 167 Ala. 138, where plaintiff failed, with the following cases where he succeeded: Sloss-Sheffield, etc., Co. *v.* McLaughlin (1911) 173 Ala. 76, 79; Duy *v.* Alabama, etc., R. R. (1911) 175 Ala. 162, 177.

As to recovery for alleged *permanent* diminution of value; where an obstruction is of such a character as is usually permanent, and where the creator of the obstruction apparently intends its continuance:

If the obstruction is legally authorized, and the plaintiff sues under a statute allowing him to recover damages, there would generally be no question of his right to recover for permanent depreciation in value.

Suppose, however, that the obstruction was not legally authorized and was wholly wrongful. Plaintiff, no doubt, can recover for *temporary* depreciation in rentable or usable value. But can he recover for *permanent* depreciation in value, for diminution in salable value?

Two views are entertained.

One is, that he cannot, under any circumstances, recover for permanent depreciation. The unlawful obstruction is liable to be abated by legal proceedings. In that case, a plaintiff, who had recovered for permanent depreciation, "would be restored to the full enjoyment of his property, and be paid for it besides." McKinstry, J., Hopkins *v.* W. P. R. R. (1875) 50 Cal. 190, 194; and compare Wardlaw, J., McLaughlin *v.* Railroad (S. C. 1850) 5 Rich. Law, 583, 592.

The other view makes the right depend on the form of plaintiff's action, and upon his willingness to acquiesce in the continuance of the obstruction in case he is permitted to recover as for a permanent depreciation. This view is thus expressed by Mitchell, J.: "Where the character of the injury is permanent, and the complaint for damages recognizes the right of the defendant to continue in the use of the property wrongfully appropriated, and to acquire as a result of the suit the plaintiff's title to the right appropriated, we can see no reason why the damages may not be assessed on the basis of the permanent depreciation in value of the

would, we believe, allow an action for actual damage (*e. g.* pecuniary loss due to delay) caused by the obstruction to the landowner, when attempting to travel on the way for purposes connected with the beneficial use of his land.

We agree with Mr. Randolph, that the fact that a single outlet is left is not conclusive evidence that there is no legal injury to the property by cutting off connection in all other directions. "If a convenient way be cut off, leaving only a decidedly inconvenient one," it will often happen that the landowner thus incurs pecuniary loss, and may well be entitled to compensation.[115]

We have now to consider the case where the obstruction in the public way "is beyond the next cross street from the plaintiff's property."[116]

Plaintiff still has left, by the use of the cross roads, a connection with the general system; but it may be more circuitous, less convenient, and more expensive than the previous direct connection. Although each of the obstructions is at a point beyond the next intersecting street, yet the closing of the previous direct connection may render plaintiff's land less valuable for salable, rentable, or usable purposes.

By the great weight of authority, the plaintiff has no action.[117]

But it seems better,—and such appears to be the view preferred by Mr. Lewis,—to reject all arbitrary limitations. Justice

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property injured . . . Where the action is in trespass, to recover for a past injury, treating the obstruction as unlawful, without any recognition of the right of the defendant to continue the obstruction, and acquire the right appropriated from the recovery and payment of a judgment, . . . only such damages as accrued up to the time of the commencement of the action are recoverable." Indiana, etc. R. R. *v.* Eberle (1886) 110 Ind. 542, 551; and see Cincinnati, etc. R. R. *v.* Miller (1905) 36 Ind. App. 26, 32-33.

Authorities are collected and discussed in 1 Sedgwick, Damages (9th ed.) §§ 93, 94, 95; and 3 Sedgwick, §§ 947, 1189, *et seq.* See also 1 Sutherland, Damages (3rd ed.) § 116, and 4 Sutherland, §§ 1016, 1038, 1039.

It may be suggested that the acquiescence of the plaintiff in the continuance of the obstruction to a highway would not prevent the public authorities from insisting upon its removal.

[115]See Randolph, Law of Eminent Domain § 411; and also the view expressed in 1 Lewis, Eminent Domain (3rd ed.) at end of § 202.

See also the very forcible views of Fell, J., *In re* Melon Street (1897) 182 Pa. 397, 403-404. The learned judge was there assuming that the abutting owner had "a special right" to use the street "as a means of access to his property". But his views as to what would constitute an infringement of such a special right have a bearing on the question what would be an actionable violation of the public right of using the street, (assuming the right of user to pertain to the landowner simply as a member of the general public).

[116]See 1 Lewis, Eminent Domain (3rd ed.) § 203.

[117]See 1 Lewis, Eminent Domain (3rd ed.) § 203 and n. 95, § 207 and n. 20.

would be more fully attained by laying down the broad rule, that an action lies if the obstructions, no matter at what point they are placed, have the actual effect of depreciating the value of plaintiff's real estate, or of causing actual damage to the plaintiff in some other way. The right to damages for depreciation "cannot be reduced to a question of distance, but depends upon the fact of the market value of the premises being actually depreciated by reason of the obstruction . . ."[118]

Question 3. What, if any, arbitrary tests as to the existence of causal relation between the obstruction and the damage?

Some cases might as well be classified under the preceding head (Question 2) as under the present head (Question 3). The difference sometimes seems to be more in the form of stating the issue than in its substance.

Two arbitrary tests may be suggested. One is, that there is no causal relation (*i. e.,* none that the law will recognize as justifying recovery), unless the obstruction is located upon the same street with the plaintiff's land.[119]

Another view, not capable of such definite statement as the foregoing, amounts in substance to this:—No causative relation is legally recognizable, unless the obstruction was but a short distance from (was within the immediate neighborhood of) the plaintiff's land. This principle, though not distinctly stated as the *ratio decidendi,* would seem to have been a substantial factor in inducing certain decisions where courts have refused to submit the question of causation to a jury.

Instead of the above test, we prefer to adopt another and a far broader view; namely, that there are no positive legal rules, no arbitrary limitations as to the distance, or position, of the obstruction. It is enough if the obstruction did, in fact, cause the diminution in value, or any other actual damage alleged by the plaintiff. The right to redress does not depend "on the proximity or distance of the operative cause of the injury."[120]

Under this view, the question of the existence of causal relation is one of fact for the jury. But this proposition "is necessarily subject to the limitation affecting the submission of all ques-

[118]See 1 Lewis, Eminent Domain (3rd ed.) § 354, p. 649, and § 207, p. 392: also cases cited under next topic as to causative relation; and Gose, J. (1911) 62 Wash. 218, 225.

[119]This view seems to have been made the basis of decision in Prosser *v.* City of Ottumwa (1876) 42 Iowa 509; explained in 43 Iowa 640.

[120]See Bryan, J., Lake Roland El. R. R. *v.* Webster (1895) 81 Md. 529, 535,

tions of fact to the jury: that if on the evidence reasonable men can come to only one conclusion, there is no question for their [the jury's] decision."[121]

This broad view is strongly sustained by decisions of the English and Scotch courts, in suits founded upon the statute which gives compensation where lands are "injuriously affected" by certain public works carried on by authority of Parliament. Two cases, each finally decided in the House of Lords, deserve special mention.[122]

Question 4. Does loss of business constitute a legal element of damage to a landowner from the obstruction of a highway?[123]

On principle, an affirmative answer seems correct.[124]

As to authority, there is certainly no preponderance against an affirmative answer. On the contrary, the weight of authority seems to favor it. Such was the decision, in 1835, in *Wilkes* v. *Hunger-*

[121]Parsons, J., in McGill *v.* Maine & N. H. Granite Co. (1899) 70 N. H. 125, 129. And see Lord Young, in Walker's Trustees *v.* Caledonian R. R. (1881) 8 Sc. Sess. Cas. (4th series) 405, 422.

[122]Metropolitan Board of Works *v.* McCarthy (1872) L. R. 8 C. P. 191; (1874) L. R. 7 H. L. 243. Walker's Trustees *v.* Caledonian R. R. (1882) 8 Sc. Sess. Cas. (4th series) 405; s. c. 7 App. Cas. 259.

Bramwell B., L. R. 8 C. P. 210. "Here the premises are injuriously affected, and for actual and potential purposes they are of less value. If it is to be asked where the line is to be drawn, I answer, not by distance in point of measurement. Premises might be injuriously affected by the stopping of a landing place ten miles off if there was no other within twenty of the premises affected."

See also Lord Penzance, L. R. 7 H. L. 263, 264; and Lord Selborne, Chancellor, 7 App. Cas. 285.

[123]It may be doubted whether No. 4 should be stated here as a distinct question. So far as it concerns the actionability of an obstruction of the public right of passage, it seems included under the previous Questions 2 and 3, especially the latter. It might be said that its solution simply calls for a special application of the general principles stated under those heads. If, on the other hand, it is regarded as chiefly important because it raises a particular point under the general law of damages, it might be thought foreign to the special subject of this article. Question 4 has repeatedly come before the courts, and, without attempting a full discussion upon principle, we here group together some authorities.

[124]See Salmond, Torts (1st ed.) § 92, pp. 272-273, par. 6.

It may be said that when his former customers cease to trade with a storekeeper, the latter has no action against them; they had a right to choose for themselves as to that matter. See Erle, C. J., in the Ricket Case, 5 B. & S. 160-162. The answer is, that the storekeeper had a right, *as against third persons*, that the third persons should not, by tortious interference, influence the choice to be made by the customers. See a fuller statement of this answer in an article on Labor Litigation, 20 Harvard Law Rev., 260-261.

It may also be said that the defendant's creation of the obstruction would not have caused the damage but for the intervening conduct of another person, *viz.*, the customer. But this would not be the unforeseeable intervention of an independent wrongdoer. The customer is blameless; and his subsequent conduct would generally be foreseeable. See 25 Harvard Law Rev. 118.

ford Market Co., 2 Bing. N. Cas. 281. This was regarded as settled law in England until the *Ricket Case*, which was finally decided in the House of Lords in 1867.[125] The latter case has sometimes been regarded as having virtually overruled the *Wilkes Case*.[126] But we agree with Mr. Salmond in disputing this view.[127]

Mr. Salmond says: "It is to be remarked, however, that there is nothing in the *decision* of the House of Lords in this case which is inconsistent with the *Hungerford Market Case*, and the observations made upon the latter case are *dicta* unnecessary to the matter in hand. *Ricket's Case* decides merely that on the true interpretation of the Lands Clauses Act and the Railways Clauses Act claims to compensation under these Acts are limited to damage done to the property affected, and do not extend to damage done to the good will of a business."[128]

Pollock says: "*Ricket's Case* is perhaps best treated as an anomalous decision on the construction of a statute with regard to particular facts. . . ."[129] While he seems inclined, though with evident reluctance, to regard the *Wilkes Case* as no longer law in England, he, nevertheless, adopts the principle of that case in the Draft of his Indian Civil Wrongs Bill;[130] and thinks it probable that the supposed English rejection of the *Wilkes Case* "would not be accepted in other jurisdictions where the common law is received."[131]

In *Benjamin* v. *Storr* (1874) L. R. 9 C. P. 400, and *Fritz* v. *Hobson* (1880) 14 Ch. D. 542, the plaintiff landowner prevailed. Whatever may have been *said* by counsel or judges, the *decision*

[125]Ricket *v.* Metropolitan Ry. (1867) L. R. 2 H. L. 175.

[126]See Willes, J., Beckett *v.* Midland R. R. (1867) L. R. 3 C. P. 82, 100.

[127]In the Wilkes Case, plaintiff was suing to recover damages for conduct which was tortious at common law. In the Ricket Case, there was no tort. The acts there done by defendants had been authorized by Parliament, whose power is not limited by any constitutional restrictions. Plaintiff would have had no remedy if the legislature had not enacted that he might be allowed to recover compensation for damage of a certain description. His action was founded upon this statute. The precise question was whether loss of customers was a kind of damage which could be recovered for *under that statute*. The statute allowed compensation where lands or interests in land were "injuriously affected" by the construction of certain legally authorized public works; in this instance, by the construction of a railroad under powers legally conferred upon a company. The decision was, that diminution in the business carried on upon land by the owner does not amount to injurious affection of the land; and hence is not ground of recovery under the statute.

[128]Salmond, Torts (1st ed.) § 92, par. 6, p. 272.

[129]Pollock, Torts (6th ed.) 612, note *d*.

[130]Pollock, Torts (6th ed.) 612.

[131]Pollock, Torts (6th ed.) 388, note *d*.

in these cases is not inconsistent with the result in the *Wilkes Case*. In L. R. 9 C. P. 406, Brett, J., distinguishes the *Ricket Case* from the case then before the court.[132]

The American authorities are not unanimous. Some conflicting United States and Canadian cases are cited in the note below.[133]

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[132]The Ricket Case cannot be regarded as a strong authority even upon the precise point there decided, *i. e.* as to the construction of the statute. The case went through three courts, and was passed upon by thirteen judges. Of these a majority, seven against six, were opposed to the decision finally rendered. See 5 B. & S. 149, 156. The final decision was concurred in by only two of the three Law Lords who heard the argument; and the third, who delivered a vigorous dissenting opinion, was no less a personage than Lord Westbury. The intrinsic correctness of the final decision has since been seriously questioned; see L. R. 8 C. P. 191, 212; and its incongruity with another decision has been very sharply brought out. See L. R. 8 C. P. 191, 205; and compare L. R. 7 H. L. 255, 264, 268.

Certainly the decision in Ricket's Case is "not strong enough to lift more than its own weight."

[133]Authorities tending, more or less directly, in favor of recovery.

Park *v.* C. & S. W. R. R. (1876) 43 Iowa 636; Brothers *v.* Tripp (1877) 11 R. I. 447, 453; Barnes *v.* Midland etc. Co. (N. Y. 1908) 126 App. Div. 435, 439; Harvey *v.* Railroad (1892) 90 Ga. 66; Brunswick & W. R. R. *v.* Hardey (1901) 112 Ga. 604; Telephone Co. *v.* Hirschman (1909) 43 Ind. App. 283, 289, 290; Callanan *v.* Gilman (1887) 107 N. Y. 360; Flynn *v.* Taylor (N. Y. 1889) 53 Hun 167, 168; s. c. (1891) 127 N. Y. 596, 600, 601. (Vann, J., p. 601: ". . . diversions of trade inevitably follow diversions of travel.") See also Brauer *v.* Baltimore etc. Co. (1904) 99 Md. 367. (Where obstruction of public road causes loss of custom to owner of toll-bridge, or toll-road, or ferry.) Draper *v.* Mackey (1880) 35 Ark. 497; Keystone Bridge Co. *v.* Summers (1878) 13 W. Va. 476; Streetville & Co. *v.* Hamilton, etc., Co. (1856) 13 U. C. Q. B. 600. (Where obstruction of river causes loss to Improvement Company, entitled to charge tolls.) Wisconsin River Improvement Co. *v.* Lyons (1872) 30 Wis. 61.

See also Gay *v.* Telegraph Co. (1882) 12 Mo. App. 485, 493; S. D. Thompson, J., in Heer Dry Goods Co. *v.* Citizens' R. R. (1890) 41 Mo. App. 63, 78. Black, J., in Glaessner *v.* Anheuser-Busch Ass'n. (1890) 100 Mo. 508, 516. Canton Warehouse Co. *v.* Potts (1891) 69 Miss. 31; Brown *v.* Florida, etc. Ass'n. (1910) 59 Fla. 447; Stetson *v.* Faxon (Mass. 1837) 19 Pick. 147, is regarded by Pollock as following Wilkes Case, there cited on p. 159 without disapproval. See Pollock, Torts (6th ed.) 612, note *d*. The Massachusetts court has tried very hard to distinguish Stetson *v.* Faxon from later decisions of its own, which seem inconsistent with Wilkes' Case. See Willard *v.* Cambridge (Mass. 1862) 3 Allen 574, 575.

See Schimmelmann *v.* Railroad (1911) 83 Oh. St. 356, 371. See also Aldrich *v.* Wetmore (1893) 52 Minn. 164. On the general subject, see note in 13 L. R. A. [N. S.] 253-257.

Authorities tending, more or less directly, against recovery.

Hohmann *v.* Chicago (1892) 140 Ill. 226; Walls *v.* Smith (1910) 167 Ala. 138, 145; Old Forge Co. *v.* Webb (N. Y. 1900) 31 Misc. 316; s. c. 65 N. Y. Supp. 503; affirmed in 57 App. Div. 636; Prosser *v.* City of Ottumwa (1876) 42 Iowa 509. (But see Beck, J., p. 511.) Heller *v.* Atchison, etc., R. R. (1882) 28 Kan. 625; Willard *v.* Cambridge (Mass. 1862) 3 Allen 574; Hamilton, etc. Co. *v.* Great Western R. R. (1859) 17 U. C. Q. B. 567.

See Liermann *v.* Milwaukee (1907) 132 Wis. 628; Talbott *v.* King (1889) 32 W. Va. 6; also Cram *v.* Laconia (1901) 71 N. H. 41, 50, 51.

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FEBRUARY, NINETEEN HUNDRED AND FIFTEEN.

NOTES.

PRESENCE OF DEFENDANT AT RENDITION OF VERDICT IN FELONY CASES. —Trial by jury in criminal cases is guaranteed in the States by constitutional provisions.[1] The trial includes all of the proceedings through the rendition of the verdict, and it is a firmly established rule that "in criminall cases of life or member, the jury can give no privy verdict, but they must give it openly in court."[2] This is universally construed to mean that in cases of felony the verdict must be delivered in the presence of the defendant in open court.[3] The rule seems to be based

[1]See note to case of Gore *v.* State (Ark. 1889) 5 L. R. A. 832, 835.

[2]2 Co. Lit., 227, b.

[3]Archbold, Criminal Pleading, Evidence, & Practice (24th ed.) 226; 1 Chitty, Criminal Law, *636.

upon two reasons: first, that the defendant may personally poll the jury; secondly, that he may be in the power of the court and subject to its judgment,[4] since judgment cannot be passed upon him in his absence.[5] This principle has become so deeply rooted in our system of criminal practice that a verdict rendered in the enforced absence of the accused has been held by many courts to be an absolute nullity, and a complete bar to a further prosecution for the same offense.[6] The reasoning of the courts proceeds upon the theory that the defendant having been placed in jeopardy, is entitled to have his guilt or innocence legally determined by the particular jury, and a verdict in his absence being void, is equivalent to an acquittal.[7] The obvious fallacy of this, however, is that the jury did in fact render a true verdict of guilty, irregular though it be, and so the court, in its zealousness to safeguard the accused, is invoking a fiction to defeat the administration of justice, whereas fictions are properly resorted to only in furtherance of justice.[8]

As to whether the defendant himself may waive the right to be present, there is a conflict of authority among the States.[9] The reason usually assigned for the view prohibiting a waiver is that the privilege, while for the benefit of the accused, is primarily dictated by the interests of the State.[10] But all laws are based upon public interests, and to disallow a waiver on that ground alone is to forbid it in every case. The only real benefit the defendant derives from his presence is the right to poll the jury. This is something that is essentially personal, and, since the privilege is exercisable entirely at his volition, there should be no objection to allowing him to waive it altogether. The other necessity, public in character, for the defendant's presence, is that judgment may be passed upon him. But since judgment can be rendered at any time after the reception of the verdict that the defendant's presence may be secured, this difficulty is obviated. Moreover, the view that an express waiver should be allowed, is fortified by cases where a

[4]See People *v.* Perkins (N. Y. 1828) 1 Wend. 91; Price *v.* State (1858) 36 Miss. 531.

[5]*Cf.* State *v.* Dolan (1905) 58 W. Va. 263; Rex *v.* Harris (1697) 1 T. Raym. 267.

[6]Nolan *v.* State (1875) 55 Ga. 521; Harris *v.* State (1907) 153 Ala. 19; Finch *v.* State (1876) 53 Miss. 363; but *cf.* People *v.* M'Kay (N. Y. 1820) 18 Johns. *212, *215. When, however, the jury is discharged at the defendant's request, or with his consent, he may be tried anew. Commonwealth *v.* Sholes (Mass. 1866) 13 Allen 554; McCorkle *v.* State (1859) 14 Ind. 39.

[7]See Nolan *v.* State, *supra*; Wells *v.* State (1906) 147 Ala. 140.

[8]Where, however, the court, without legal necessity, discharges the jury in the absence of the defendant and before it has returned a verdict, this reasoning would not apply, and the defendant should be discharged. See note to case of Upchurch *v.* State (Tex. 1896) 44 L. R. A. 694.

[9]1 Bishop, New Criminal Procedure (2nd ed.) 238. Some courts allow waiver in felony cases generally, Beale, Criminal Pleading & Practice, § 215, but not in capital cases. See 9 Columbia Law Rev. 178; State *v.* Cherry (1911) 154 N. C. 624; *contra,* Cawthon *v.* State (1904) 119 Ga. 395. This exception seems to be the rule in the federal courts. See Hopt *v.* Utah, *infra*; Lewis *v.* United States (1892) 146 U. S. 370.

[10]1 Bishop, New Criminal Procedure (2nd ed.) 238; 2 Willoughby, Constitutional Law, § 419.

defendant who absconds while on bail, is deemed to have waived his right to be present at the rendition of the verdict.[11]

It is often held that a waiver by counsel unattended by any act of ratification by the defendant, will not be valid.[12] This illustrates the extremity to which courts go in protecting the accused, for, since counsel is supposed to be always on the alert to safeguard every possible interest of his client, and since he should be better qualified to say what is for the best interests of the accused, ample justification might be found for a contrary view. In the recent case of *Frank* v. *State* (Ga. 1914) 83 S. E. 645, the court expressed its opinion that a waiver by counsel of defendant's presence at the rendition of the verdict in a capital case, and a failure of the accused to make any objection to it in a later motion for a new trial, amounted to an acquiescence in the waiver sufficient to preclude its use as a basis for a subsequent motion to set aside the verdict as unconstitutional under the Fourteenth Amendment.[13]

The Fourteenth Amendment does not require a jury trial as a necessary requisite for due process in the State.[14] Likewise, it does not prevent any departure from the customary practice in any of the incidents of jury trial, where the State shall deem it conducive to the public welfare and not repugnant to the ends of justice.[15] In *Hopt* v. *Utah*,[16] the Supreme Court declared that the right to be present at every part of the proceedings in a felony case could not be waived, but this was a decision in regard to the practice in federal courts, and not in reference to the powers of the State under the Fourteenth

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[11]Barton *v.* State (1881) 67 Ga. 653; Commonwealth *v.* McCarthy (1895) 163 Mass. 458, in which the court, alluding to the defendant's absence at the time of the reception of the verdict, says at p. 460: "There is no very important reason for requiring the defendant's presence then."

[12]Shipp *v.* State (1881) 11 Tex. App. 46; State *v.* Jenkins (1881) 84 N. C. 812. The failure of counsel to take exception will not generally be binding upon the defendant. Maurer *v.* People (1870) 43 N. Y. 1; Percer *v.* State (1907) 118 Tenn. 765.

[13]A writ of error was refused by two justices of the Supreme Court, on the ground that the decision by the State court did not involve the determination of any federal question but was a ruling merely on a question of State practice. In this view of the case, that part of the opinion dealing with the waiver of the defendant's presence would seem to be dictum.

[14]See 1 Harvard Law Rev. 318. In Maxwell *v.* Dow, *infra*, Mr. Justice Peckham, delivering the opinion, says, at p. 603, "Trial by jury has never been affirmed to be a necessary requisite of due process of law."

[15]*Cf.* 2 Story, Constitutional Law (5th ed.) § 1947; Maxwell *v.* Dow, *infra*, p. 605.

[16](1884) 110 U. S. 574. Utah at the time was a territory, and the provisions of the Constitution applicable to the federal government in reference to trial by jury and due process, were construed, see Thompson *v.* Utah (1898) 170 U. S. 343, 349, and not the Fourteenth Amendment which applies only to a State. Moreover, the Supreme Court rendered its decision not in the light of the Constitution, but as an appellate court in the enforcement of a provision in the Criminal Code of Utah, which required that the "defendant must be personally present at the trial." It is interesting to note that Mr. Justice Harlan, who delivered the opinion in the case, was overruled in most of the subsequent leading cases in regard to his view of the relation of the Fourteenth Amendment to the States.

Amendment.[17] The Court has held that the Amendment does not require of the States an indictment by grand jury in a prosecution for a felony,[18] nor does it prevent trial by a jury of eight,[19] nor does it require that a witness be exempt from compulsory self-incrimination,[20] although in a federal proceeding any of these objections might be successfully urged under the Constitution. The more recent decisions of the Supreme Court show clearly that in matters of criminal procedure the question of due process is largely left to the courts in the individual States.[21] In the absence of exceptional circumstances, therefore, the determination by the State court that the right to be present can be waived, would seem to be conclusive of the question, especially since the right is one which does not go to the very essence of criminal process.[22]

Jurisdiction of Actions at Law Concerning Realty in Foreign State.—Under the old common law, when juries consisted of witnesses from the vicinage who were acquainted with both the parties and the facts, the venue of an action had to be laid in the county where the injury was alleged to be done.[1] But as conditions changed, and the courts sought to enlarge their jurisdiction, they modified this rule by a fiction whereby a plaintiff could allege that the transaction occurred in any county in England where he wished to bring his suit, and this allegation of venue was not permitted to be traversed except where the court deemed its truth to be material.[2] In determining whether the venue was material, they drew a distinction between transitory and local actions,—"that is, between those in which the facts relied on as the foundation of the plaintiff's case have no necessary connection with a particular locality, and those in which there is such a connection."[3] It was said that real and mixed actions were local, and could be tried only by the courts of the locality where the land was situated, whereas personal actions were transitory, and could be tried anywhere.[4] This rule was so technical and so often worked injustice, that it was attacked by Lord Mansfield, who argued that the true distinction in respect of jurisdiction was between proceedings *in rem,* where the effect of the judgment cannot be had unless the thing lies within reach of the court, and actions *in personam,* where damages only are sought.[5] Lord Mansfield's view was approved by Chief Justice Marshall in the leading case of *Livingston* v. *Jefferson,*[6] and has been

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[17]See McGehee, Due Process of Law, 167.

[18]Hurtado *v.* California (1884) 110 U. S. 516.

[19]Maxwell *v.* Dow (1900) 176 U. S. 581.

[20]Twining *v.* New Jersey (1908) 211 U. S. 78.

[21]Guthrie, Fourteenth Amendment, 101; McGehee, Due Process of Law, 167; Rogers *v.* Peck (1905) 199 U. S. 425, 434.

[22]See Garland *v.* Washington (1913) 232 U. S. 642, 646.

[1]1Holdsworth, History of English Law, 155, n. 9.

[2]W. S. Holdsworth, in 14 Columbia Law Rev., 551-556.

[3]See British South Africa Co. *v.* Companhia De Mocambique, L. R. [1893] A. C. 602, 618.

[4]Story, Conflict of Laws (8th ed.) § 538.

[5]See Mostyn *v.* Fabrigas (1774) 1 Cowp. 161.

[6](1811) Fed. Cas. No. 8411.

adopted by some of our States.[7] It has not been followed in England,[8] however, and even Marshall felt constrained to reject it for the established common law rule, which prevails generally in this country.

It is important, therefore, to note some of the main features of the rule as accepted and modified by our courts. The broad proposition is that an action at law for breach of a contract relating to lands is transitory,[9] whereas an action based on a tort against the same lands is local, whether the action is in trespass for direct injuries,[10] or on the case for indirect injuries such as flooding lands.[11] There is no valid reason for this distinction, and the idea that tort actions are local seems unsound in view of the fact that actions for torts against persons, or chattels, are regarded as transitory. This inconsistency is well illustrated in the recent case of *Potomac Milling & Ice Co.* v. *Baltimore & Ohio R. R.* (D. C. D. Md. 1914) 217 Fed. 665, where the plaintiff sued in Maryland to recover damages for the negligent destruction by fire of some buildings and their contents in West Virginia. The plaintiff's cause of action was simply his right to damages for the defendant's negligence. The negligence which resulted in the destruction of the buildings was the same as that resulting in the destruction of the contents. It would be proved by the same state of facts, and the defendant's responsibility for it would be the same; and yet the court was compelled to hold, reluctantly, that while it had jurisdiction of so much of the action as related to the destruction of the contents of the buildings, which were personal property, yet it could not take cognizance of the destruction of the buildings themselves, which were real property. This distinction is not only unsound, but it also frequently works injustice by depriving the plaintiff of all remedy so long as the defendant stays away from the jurisdiction where the land is located.[12]

The general rule has some important distinctions and exceptions. In the case of contracts, there is a distinction governing actions brought on covenants running with the land, to the effect that if the action is brought by or against a grantee of either the covenantor or the covenantee, and is, therefore, based on privity of estate instead of privity of contract, it is local and must be brought in the jurisdiction where the land is situated.[13] In the case of torts, an illogical exception exists where an act done in one State damages real property in another; for then, the plaintiff is allowed to bring his action in either jurisdiction.[14]

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[7]Little *v.* Chicago, etc. R. R. (1896) 65 Minn. 48; Holmes *v.* Barclay (1849) 4 La. An. 63. In a few States, the rule has been changed by statute. See Coleman *v.* Lucksinger (1909) 224 Mo. 1; Tillotson *v.* Pritchard (1887) 60 Vt. 94, 104 *et seq.*; Oliver *v.* Loye (1881) 59 Miss. 320.

[8]British South Africa Co. *v.* Companhia De Mocambique, *supra.*

[9]Mattix *v.* Swepston (1913) 127 Tenn. 693; Port *v.* Jackson (N. Y. 1819) 17 Johns. *239.

[10]Allin *v.* Connecticut River Lumber Co. (1890) 150 Mass. 560; Ellenwood *v.* Marietta Chair Co. (1895) 158 U. S. 105.

[11]Watts *v.* Kinney (N. Y. 1840) 23 Wend. 484; Eachus *v.* Trustees (1856) 17 Ill. 534.

[12]See Clark *v.* Scudder (Mass. 1856) 6 Gray 122; Karr *v.* New York etc. Co. (1909) 78 N. J. L. 198.

[13]White *v.* Sanborn (1833) 6 N. H. 220; Keyes etc. Co. *v.* Trustees (N. Y. 1911) 146 App. Div. 796, affd. 205 N. Y. 593; see Henwood *v.* Cheeseman (Penn. 1817) 3 S. & R. *500.

[14]Smith *v.* Southern Ry. (1909) 136 Ky. 162; Mannville Co. *v.* City of Worcester (1884) 138 Mass. 89.

In thus allowing a suit in the State where the wrongful act was committed, the court admits that it can take cognizance of the wrongful act alone, without having the land in its jurisdiction. If such wrongful act is transitory, as it certainly seems, there is no reason why it should not be made the basis of an action in any State where the defendant can be found. Another fine-drawn distinction arises where the cause of action consists in the removal of stone, timber, etc., from lands in other States. In this connection, many apparently conflicting decisions are reconciled when we observe that the question as to whether the action is local or transitory, depends entirely on the framing of the declaration. If the plaintiff ignores the damage to his freehold and simply brings a personal action, such as conversion, for the value of the timber or minerals removed, the action is transitory;[15] but if any part of the damages claimed is for injury to the freehold, the action is local.[16] Finally, a distinction which would have enabled the court in the principal case to take jurisdiction of the entire action, is made in some States between actions in trespass for direct injuries to land, and actions on the case for indirect injuries. According to this rule, where, as here, the gravamen of the action is simply the negligence of the defendant, such as permitting sparks to escape from locomotives, the action is transitory.[17] But even this doctrine has been repudiated by the weight of authority,[18] according to which the principal case is correct.

A Limitation on the Right to Subrogation.—A seemingly well-defined limitation on the doctrine of subrogation, a doctrine unusually difficult of definition, is the rule that subrogation will not be allowed to one who was personally and primarily liable on the debt which he has paid, for the reason that payment by one so liable operates to extinguish the debt with its lien. Within this description has been included the grantee of incumbered premises who has agreed to discharge the incumbrance. Although a typical case for subrogation is presented when a grantee who has merely taken subject to the incumbrance, discharges it in ignorance of a junior lien which by his payment will be given priority,[1] a strong line of decisions denies such relief to the grantee who by his agreement has made himself personally liable on the obligation.[2] It is difficult to see why this distinc-

[15]Hodges *v.* Hunter Co. (1911) 61 Fla. 280; Stone *v.* United States (1896) 167 U. S. 178, 182.

[16]Ophir Silver Mining Co. *v.* Superior Court (1905) 147 Cal. 467; Kentucky etc. Co. *v.* Mineral Development Co. (C. C. 1911) 191 Fed. 899.

[17]Ducktown Sulphur, etc. Co. *v.* Barnes (Tenn. 1900) 60 S. W. 593, 606; Home Ins. Co. *v.* Penn. R. R. (N. Y. 1877) 11 Hun 182; *cf.* Titus *v.* Frankfort (1838) 15 Me. 89.

[18]Brisbane *v.* Penn. R. R. (1912) 205 N. Y. 431 (three judges dissenting); Du Breuil *v.* The Pennsylvania Co. (1891) 130 Ind. 137; *cf.* Watts *v.* Kinney, *supra.* The addition in 1913 of § 982-a to the N. Y. Code of Civ. Proc., changed the rule in the Brisbane case, and makes the rule as to real property the same as the rule governing personal property.

[1]Barnes *v.* Mott (1876) 64 N. Y. 397; Ryer *v.* Gass (1881) 130 Mass. 227; Hudson *v.* Dismukes (1883) 77 Va. 242.

[2]Lackawanna Trust etc. Co. *v.* Gomeringer (1912) 236 Pa. 179; Cady *v.* Barnes (D. C. 1913) 208 Fed. 361; Poole *v.* Kelsey (1900) 95 Ill. App. 233; DeRoberts *v.* Stiles (1901) 24 Wash. 611; McDowell *v.* Lumber Co. (1906) 42 Tex. Civ. App. 260; Willson *v.* Burton (1880) 52 Vt. 394.

tion should be made, and in a number of jurisdictions, of which the recent case of *Tibbits* v. *Terrill* (Colo. 1914) 140 Pac. 936, is typical, the rule is not applied.[3] In that case a purchaser from a fraudulent grantor, having constructive, though not actual, notice that the conveyance to his grantor was in fraud of a judgment creditor having a lien on the land, was allowed subrogation, as against the judgment creditor, to the lien of a first mortgage which he had assumed and discharged. Since the courts, where the grantee has not assumed the incumbrance, have been willing to invoke subrogation to protect him when he has paid off the prior lien, and is in danger of losing the benefit of his payment because of the existence, unknown to him, of a junior lien, it seems wrong to deny such relief to another grantee because, as between himself and his grantor, he had agreed to pay the debt. While this agreement might properly defeat any equity he would otherwise have to subrogation against his grantor, it should not have such effect as between him and the second incumbrancer, as regards whom he was under no agreement to discharge the prior incumbrance.[4] The cases giving the agreement this effect announce, apparently without qualification, that payment by the owner of the legal estate, who is personally bound to pay, merges the lesser estate in the greater. As opposed to this, the group of cases of which the principal case is an example, declare that in equity the question of merger is governed by the intention of the parties, and they presume an intention to keep the interests separate when an intervening claim makes it to the advantage of the grantee to do so, making no distinction between a grantee who has assumed the incumbrance and one who has not.[5] In weighing the opposing equities of the grantee and the junior lienholder, these cases make the point that to allow subrogation works no hardship to the latter when he has not altered his position on the strength of the discharge of the prior incumbrance. His security when he acquired it was subject to this superior lien, and he should not reap the benefit of the other man's innocent mistake.[6]

Another element entering into the determination of the right to subrogation in these cases, is the effect of notice of the existence of a second incumbrance. In some of the cases denying subrogation, though the decisions are based on the effect of an agreement to discharge, the facts show that the grantee had actual notice of the intervening lien.[7] Such notice should materially weaken his equity to subrogation, as he made the payment with full knowledge of the circumstances and not by mistake.[8] As to just what notice is required to defeat the right, the cases differ; in the principal case and those in accord with it, there was at least constructive notice by record, and yet the claim was

[3]Matzen *v.* Schaeffer (1884) 65 Cal. 81; Capitol Nat. Bank *v.* Holmes (1908) 43 Colo. 154; Johnson *v.* Tootle (1897) 14 Utah 482; Wilson *v.* Kimball (1853) 27 N. H. 300; Clute *v.* Emmerich (1885) 99 N. Y. 342.

[4]Clute *v.* Emmerich, *supra.*

[5]Duffy *v.* McGuiness (1882) 13 R. I. 595.

[6]See cases cited in note 3, *supra.*

[7]See Lackawanna Trust etc. Co. *v.* Gomeringer, *supra*; Cady *v.* Barnes, *supra*; DeRoberts *v.* Stiles, *supra*; Willson *v.* Burton, *supra.*

[8]But see Joyce *v.* Dauntz (1896) 55 Ohio St. 538 (holding that the right is not affected by notice); Stantons *v.* Thompson (1870) 49 N. H. 272 (holding that where there is a title intervening between the two interests, it will be presumed as a matter of law that the parties did not intend a merger).

allowed.[9] There is, however, good authority for the holding that subrogation will not be allowed one who has discharged an incumbrance with constructive notice of an intervening claim.[10]

In the principal case, the further element of fraud was present; the court holding that the grantee was not, through constructive notice, chargeable with such participation in the fraud on the judgment creditor as would defeat his right to subrogation. One guilty of fraud has no right to equitable relief by subrogation.[11] The question here presented is whether one who has constructive or implied notice of the fraud is chargeable with participation in it, and it is quite generally held that constructive notice has this effect.[12] A few jurisdictions, however, including Colorado, seem to differentiate between constructive notice by record, and knowledge of facts sufficient to put a reasonable man on inquiry, holding that the former does not as a matter of law charge one with participation, though the latter may raise a question of fact for the jury as to participation in the fraud.[13]

Priority of Judgment Liens on Real Estate.—At common law, a judgment created no lien on real estate,[1] but the effect of the Statute of Westminster II, 13 Edw. I, c. 18, was to make all judgments liens on the debtors' lands from the first day of the term at which they were rendered.[2] That rule has since been changed by modern statutes, upon which judgment liens now depend and under which they date from the time when the judgments are docketed,[3] or entered,[4] and in some States from the time of their rendition.[5] These statutes are of substantially the same effect, for even under the last mentioned a judgment is not considered to have been rendered so as to constitute a lien until it has

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[9]See cases cited in note 3, *supra*; Neff *v.* Elder (1907) 84 Ark. 277.

[10]Ragan *v.* Standard Scale Co. (1907) 128 Ga. 544; Kitchell *v.* Mudgett (1877) 37 Mich. 81; Stastney *v.* Pease (1904) 124 Ia. 587; Kahn *v.* McConnell (1913) 37 Okla. 219; *cf.* Conner *v.* Welch (1881) 51 Wis. 431.

[11]Railroad Co. *v.* Soutter (1871) 13 Wall. 517; see Harris, Law of Subrogation, § 813.

[12]German Bank of Memphis *v.* United States (1893) 148 U. S. 573; Kansas Moline Plow Co. *v.* Sherman (1895) 3 Okla. 204; Salisbury *v.* Burr (1896) 114 Cal. 451; Moore *v.* Williamson (1888) 44 N. J. Eq. 496.

[13]Riethmann *v.* Godsman (1896) 23 Colo. 202; Greenwald *v.* Wales (1903) 174 N. Y. 140; see Carroll *v.* Hayward (1878) 124 Mass. 120. In the principal case, whereas the majority of the court finds mere constructive notice by record, the dissenting judge seems to think the attempted subrogee was in possession of facts which should have put him on inquiry, and that a former holding of the Supreme Court in the same case (44 Colo. 94) that this was sufficient to charge him with fraud, should be binding on this court in determining the right to subrogation.

[1]1 Black, Judgments (2nd ed.) § 397.

[2]See Savile *v.* Wiltshire (1746) 2 Barnes 212. For the various exceptions that were made to this rule, see 1 Black, Judgments (2nd ed.) §§ 441, 442.

[3]N. Y. Code Civ. Proc., § 1250; Cal. Code Civ. Proc., § 671; Minn. Gen. Stat., c. 77, § 7905.

[4]3 N. J. Comp. Stat. (1910) 2956, § 2; Fla. Gen. Stat. (1906) § 1600.

[5]1 Burns' Ann. Ind. Stat. (Rev. of 1908) § 635; Code of Ia. (1897) § 3801; Mo. Rev. Stat. (1909) §2125.

been properly entered of record.[6] Accordingly, the judgment that is first recorded in the manner prescribed has the prior lien.[7] But when two or more judgments are entered on the same day, unless it is required by statute that the exact time be noted,[8] they will, by a survival of the old fiction, relate to the earliest possible part of the day, and as inferior evidence cannot be admitted to explain the record, the liens created by them all are equal.[9] Between a judgment and a conveyance, however, since the precise time of delivery of the latter is provable by evidence *in pais,* justice requires that the actual priority of the judgment may be shown by less than record proof.[10] Consequently, when a deed has been recorded a day or more before the judgment was docketed, no lien ever attaches to the land.[11] When, on the other hand, the judgment has been docketed before the conveyance has been placed upon record, though after its execution, it is generally held that, under the recording acts, a conveyance is of no effect as against the lien of the judgment.[12] In many States, however, a different interpretation is placed upon the acts, the courts saying that the conveyances are valid without being recorded, and that the judgment creditor cannot be protected as a subsequent purchaser for value because he has furnished no new consideration for his judgment.[13]

At a very early date, it was settled in Pennsylvania that lands acquired after a judgment was obtained, but aliened before execution issued, were not subject to the judgment's lien,[14] and this view was adopted in two other jurisdictions.[15] The holding is contrary to the

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[6]Callanan *v.* Votruba (1898) 104 Ia. 672; see McKenna *v.* Van Blarcom (1901) 109 Wis. 271.

[7]Hagadorn *v.* Hart (N. Y. 1891) 62 Hun 94; Glasgow *v.* Kann (1895) 171 Pa. 262.

[8]See N. Y. Code Civ. Proc., § 1246; Bates *v.* Hindsdale (1871) 65 N. C. 423.

[9]Rockhill *v.* Hanna (1853) 15 How. 189; Bruce *v.* Vogel (1866) 38 Mo. 100; *contra,* Biggam *v.* Merritt (1831) 1 Miss. 430.

[10]Mechanics' Bank *v.* Gorman (Pa. 1844) 8 W. & S. 304; Hunt *v.* Swayze (1892) 55 N. J. L. 33. This is also true of a contest between a mortgage and a judgment. See Murfree's Heirs *v.* Carmack (Tenn. 1833) 4 Yerg. 270; *contra,* Hendrickson's Appeal (1855) 24 Pa. 363.

[11]Corley *v.* Renz (Tex. Civ. App. 1894) 24 S. W. 935; Bell *v.* Davis (1881) 75 Ind. 314.

[12]Smith *v.* Willard (1898) 174 Ill. 538; Frothingham *v.* Stacker (1847) 11 Mo. 77; Young *v.* Devries (1879) 72 Va. 304. But unless the judgment creditor is without notice, the conveyance will prevail. Adam *v.* Tolman (1899) 180 Ill. 61.

[13]Smith *v.* Savage (1896) 3 Kan. App. 556; Schroeder *v.* Gurney (1878) 73 N. Y. 430; Stanhilber *v.* Graves (1897) 97 Wis. 515. Even in such a case, a *bona fide* purchaser at a sale under execution on the judgment, acquires a title superior to that of the grantee of the unrecorded deed. Evans *v.* McGlasson (1864) 18 Ia. 150.

[14]Colhoun *v.* Snider (Pa. 1813) 6 Binney 135. To obtain a lien on such property, it is necessary that a levy be made. See Elsbree's Appeal (1884) 106 Pa. 82.

[15]Stiles *v.* Murphy (Ohio 1831) 4 Hammond 92; Harrington *v.* Sharp (Ia. 1848) 1 Greene 131. The rule has now been changed in Iowa by statute. See Code of Ia. (1897) § 3801.

rule of the common law,[16] and in a majority of the States to-day the lien of a judgment attaches not only to lands possessed by the debtor at the time of its docketing, but also to lands which he thereafter acquires.[17] In such a case, since no judgment against the debtor can affect the land until it does become his property, all those on record against him at that time attach as liens simultaneously; they all date from the vesting of title, and no one of them is entitled to priority though the judgment upon which it depends may have been docketed long before the others.[18]

Once it has been determined that several judgment liens are equal by virtue of their date of record or manner of commencement, the question then arises as to whether this equality may be disturbed by any subsequent proceedings of the judgment creditors. According to the weight of authority, superior diligence in bringing about the satisfaction of a particular claim secures for that one a preference.[19] In accordance with the principles laid down, is the decision in the recent case of *Hulbert* v. *Hulbert* (N. Y. Sup. Ct. 1914) 86 Misc. 662, in which an undivided share in certain real estate came by descent to one against whom several judgments had at different times before that been docketed; execution was issued upon one of the judgments, and a sale had thereunder during the pendency of the partition suit. It was decided that a holder of the sheriff's certificate of sale under the judgment was entitled to priority over the other judgment creditors in the distribution of the debtor's share of the proceeds of the partition sale. The courts will not, however, allow a senior judgment lien to be defeated by a sale under a junior,[20] and even though it be held that such a sale frees the property from the older lien, the latter is entitled to a prior satisfaction from the proceeds of the sale.[21]

Relief of Parties to an Illegal Contract.—All contracts which provide for the doing of acts that are against public policy, morality, or the law, are void and unenforcible.[1] The courts not only will not assist the parties to such agreements in attaining their unlawful ends, but generally refuse to afford relief of any sort to a complainant who, in establishing his cause of action, must of necessity set forth an

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[16]4 Kent, Comm., *435, 436.

[17]1 Black, Judgments (2nd ed.) § 432.

[18]Michaels *v.* Boyd (Ind. 1848) Smith 100; Cayce *v.* Stovall (1874) 50 Miss. 396; Matter of Hazard (N. Y. 1893) 73 Hun 22; see note to Moore *v.* Jordan (N. C. 1895) 42 L. R. A. 209, indicating a slight conflict of authority. But the judgment lien will be postponed to a purchase money mortgage given at the time of making the conveyance. Cowardin *v.* Anderson (1883) 78 Va. 88; Curtis *v.* Root (1859) 20 Ill. *53; Scott etc. Co. *v.* Warren (1857) 21 Ga. 408. A mortgage given at the same time for other than the purchase money, however, is subordinate to the judgment. Weil *v.* Casey (1899) 125 N. C. 356.

[19]Lowry *v.* Reed (1883) 89 Ind. 442; Adams *v.* Dyer (N. Y. 1811) 11 Johns. *347; Bruce *v.* Vogel, *supra*; *cf.*, as to after-acquired lands, Kisterson *v.* Tate (1895) 94 Ia. 665.

[20]The land may be resold to satisfy the older lien. Littlefield *v.* Nichols (1871) 42 Cal. 372; see Jackson *v.* Holbrook (1887) 36 Minn. 494.

[21]Matthews *v.* Nance (1897) 49 S. C. 389.

[1]2 Parsons, Contracts (9th ed.) *746.

illegal purpose as the foundation for his claim.[2] These firmly established principles are frequently stated in the form of the maxims, *Ex dolo malo non oritur actio,* and *In pari delicto potior est conditio defendentis.* While giving a concise and convenient rule-of-thumb for cases of this sort, these maxims must be cautiously applied, for—like most others—they are subject to important limitations and exceptions. The general rule, then, is that neither law nor equity will intervene in behalf of a party to an illegal contract; the wrongdoers are left unaided in whatever position their wrongful transactions have placed them. Relief is refused, not for the purpose of bestowing any benefit upon the defendant, but wholly upon considerations of public interest;[3] no rights are allowed the parties, so as to avoid any recognition of the unlawful agreement which might tend to give it validity or place the courts in the position of *particeps criminis.* Argument is not needed to support the justice of the law's consistent refusal to assist in the enforcement or affirmance of an illegal contract. But what of the case where the complaining party seeks to avoid or disaffirm the contract? Does public interest here, too, demand a policy of absolute non-intervention by the courts? The decisions in point are by no means uniform, but certain broad principles may be formulated which seem to govern most of the cases, and which have received recognition from the highest authorities.

Where the contract has been completely performed, so that its unlawful object is consummated, and the parties are regarded as in equal guilt, the general rule, denying relief, is applicable.[4] But if, although there has been a partial performance of the contract, its illegal purpose has not yet been accomplished, according to the preponderance of authority a *locus poenitentiae* remains, and a party who has paid money, delivered goods, or conveyed land pursuant to the agreement, may repudiate the entire transaction and, with the help of the court, recover back the property transferred.[5] The rule in most jurisdictions seems to be that if the unlawful enterprise has been partially carried out, no action will lie for undoing what has been done under the contract, and only where the evil act may be wholly averted will the courts aid the repentant party.[6] This doctrine of *locus poenitentiae* is justified on the ground that public policy requires the courts, wherever possible, to prevent the consummation of illegal proceedings by encouraging repentance.[7]

Another limitation upon the general rule obtains in certain cases where the parties, in the light of the surrounding circumstances, are not regarded as being *in pari delicto.* In such cases, whether the contract be executed or executory, the more excusable party may sue for relief against the transaction, whenever public policy is considered

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[2]Crichfield *v.* Bermudez etc. Co. (1898) 174 Ill. 466; Emery *v.* Candle Co. (1890) 47 Ohio St. 320.

[3]See Branham *v.* Stallings (1895) 21 Colo. 211, 215.

[4]Hill *v.* Freeman (1882) 73 Ala. 200; St. Louis etc. R. R. *v.* Terre Haute etc. R. R. (1892) 145 U. S. 393, 407.

[5]Souhegan Nat. Bank *v.* Wallace (1881) 61 N. H. 24; Wassermann *v.* Sloss (1897) 117 Cal. 425; Spring Co. *v.* Knowlton (1880) 103 U. S. 49, reversing Knowlton *v.* Congress etc. Co. (1874) 57 N. Y. 518.

[6]Hooker *v.* De Palos (1876) 28 Ohio St. 251; Ullman *v.* St. Louis Fair Assn. (1902) 167 Mo. 273, 287.

[7]See Stacy *v.* Foss (1841) 19 Me. 335, 338.

to be advanced thereby.[8] Actions where the plaintiff has been induced to enter into the agreement through fraud, oppression, or undue influence on the part of the defendant, and is, therefore, not to be regarded as *in pari delicto* with the latter, are illustrative of this class of exceptions.[9] Other examples are cases in which the complaining party is one of a class of persons for whose protection the statute, which made the agreement in question *malum prohibitum,* was passed; in such suits the plaintiff is always allowed to recover property which he has transferred under the prohibited agreement.[10]

Still a third exception to the general rule is laid down by many authorities, namely, that wherever public policy requires the intervention of the courts, even though the parties are in equal guilt, the courts will intervene and grant such relief as may best serve the public interest.[11] In the decisions grouped under this exception,—if, indeed, it deserves to be called an exception,—the true theory which underlies the entire subject of relief from illegal contracts, is clearly indicated. As was pointed out in the recent case of *Hatch* v. *Gilchrist* (Ind. 1914) 106 N. E. 694, the question of the intervention of equity to relieve individuals from the effects of unlawful agreements into which they have entered, is ultimately dependent on the best interests of the public and rests in the discretion of the court. The general rule and its exceptions, which we have just considered, are useful, though artificial, tests, which may assist the court in exercising its discretion. The final inquiry, however, remains in all cases the same: "Has the complainant made such a case as would, were he innocent, entitle him to relief? And if so, does the best interest of society require that relief shall be afforded, notwithstanding the guilt of the party?"[12]

Martial Law.—The term martial law is often loosely used to mean any one of three systems of authority, to wit, (1) law for the government of military and naval forces; (2) law enforced by military or naval power in time of war, both in conquered territory and in disaffected regions at home; and (3) law enforced by the military authorities in time of peace when troops are used for the suppression of internal disorder. The first is statutory,[1] and aside from the mooted question as to how far decisions of courts-martial in cases affecting

[8]Reynell *v.* Sprye (1852) 1 De Gex, M. & G. *660, *679; Roman *v.* Mali (1875) 42 Md. 529. A distinction is sometimes drawn between cases where the wrong contemplated is *malum in se* and where it is mere *malum prohibitum,* relief being granted in only the latter class of cases. See Tracy *v.* Talmage (1856) 14 N. Y. 162; Duval *v.* Wellman (1891) 124 N. Y. 156. This seems, however, to be not an independent rule, but rather a result of the application of the principle that relief will be granted the guilty plaintiff only when public interest demands it.

[9]See Nat. Bank & Loan Co. *v.* Petrie (1903) 189 U. S. 423.

[10]As where a statute provides for the recovery of money lost on a bet or wager; Mitchell *v.* Orr (1901) 107 Tenn. 534; Kruse *v.* Kennett (1899) 181 Ill. 199; or where a statute penalizes only one of the parties, so that the other is not to be regarded as *in pari delicto.* White *v.* Bank (Mass. 1839) 22 Pick. 181.

[11]2 Pomeroy, Eq. Jur. (3rd ed.) § 941. See Lester *v.* Howard Bank (1870) 33 Md. 558; Hale *v.* Sharp (1867) 44 Tenn. 275.

[12]See Porter *v.* Jones (1869) 46 Tenn. 313, 321.

[1]*Cf.* N. Y. Consol. Laws, c. 36.

members of the military establishment are reviewable by civil tribunals,[2] is one of little concern to the public at large or to the practicing attorney. The second form of military law belongs to the realm of public law, and has been said to be of necessity the will of the commanding officer subject to the customs of war.[3] The third form of martial law is, however, of very vital concern to the American people owing to the increasing tendency to employ military force for the protection of life and property in strikes, riots, and calamities of flood and fire.[4] The discretion of the governor in declaring martial law is not subject to review by the civil courts,[5] but there are two views as to the powers of the military authorities in such exigencies. The doctrine prevailing in England is that the troops act merely as a *posse comitatus* for the suppression of violence, and that they have no power to promulgate and enforce regulations or to try civilians by court-martial for any offenses whatever.[6] The opposite view is that a proclamation of martial law by the proper authorities places all persons in the affected region under the jurisdiction of military commissions, and clothes the troops, acting under the orders of the governor, with authority even outside the zone of martial law, to suppress seditious newspapers,[7] and to arrest and detain persons suspected of fomenting disorder.[8] This form of martial law, involving a suspension of constitutional guarantees, is expressly authorized under the name of *Etat de Siege* by the constitutions of some foreign states,[9] but no such provisions appear in the Constitution of the

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[2]Since courts-martial are not inferior courts of the judiciary, in this country their decisions are not reviewable nor subject to writs of prohibition from the civil courts. The question of jurisdiction, however, is always open to inquiry on habeas corpus proceedings. 9 Columbia Law Rev. 447; State *v.* Long (La. 1914) 66 So. 377.

[3]Col. H. C. Carbaugh, U. S. A., in 7 Illinois Law Rev. 479, 495. How far this can be applied to disaffected districts at home where no actual hostilities are in progress, is a question on which the American authorities differ from the English. See article by Prof. Ballantine, 12 Columbia Law Rev. 529, 535 *et seq.; Ex parte* Marais, L. R. (1902) A. C. 109, and discussion of this case in 18 Law Q. Rev. 143. In "Martial Law", by H. Erle Richards, *Ibid.* 133, 139-140, it is said that the power to try and punish civilians in disturbed districts of one's own country in time of war, is necessary to the effectiveness of martial law.

[4]See article by Prof. Ballantine, 24 Yale Law Journ. 189; and article by Ex-Chief Judge Cullen of the N. Y. Court of Appeals, in 48 American Law Rev. 345.

[5]*In re* William Boyle (1899) 6 Idaho 609; Nance and Mays *v.* Brown (1912) 71 W. Va. 519, 524.

[6]The Case of Ship-Money (1637) 3 State Trials 825, permitting a declaration of martial law by the king in time of peace, has been effectually discredited by the Petition of Right. See Sir Frederick Pollock, 18 Law Q. Rev. 152.

[7]Hatfield *v.* Graham (W. Va. 1914) 81 S. E. 533; see discussion of this case in 14 Columbia Law Rev. 599.

[8]*Ex parte* Jones (1913) 71 W. Va. 567.

[9]Constitution of the Spanish Monarchy of 1876, Title 1, § 17. See *In re* Kalanianaole (1895) 10 Hawaiian Reports 29, which construes article 31 of the Constitution of the then Republic of Hawaii.

United States, or of any of the States.[10] As the first eight amendments to the federal Constitution are limitations upon the powers of Congress alone, the State governments are restrained from invasions of personal liberty only by the Fourteenth Amendment, and by such provisions as appear in their own State constitutions. The power to enforce this stringent form of military government is said by American courts upholding it, to rest in necessity and the right of the State to self preservation.[11]

In the recent case of *Ex parte McDonald* (Mont. 1914) 143 Pac. 947, growing out of the strike disorders at Butte, the Supreme Court of Montana has taken an intermediate position. The petitioner was first detained by the military authorities to prevent his supporting the rioters, and was then tried by court-martial and sentenced to a term of imprisonment. On an application for a writ of habeas corpus, the court held that a declaration of martial law by the governor gave the military authorities all powers necessary to suppress the insurrection, including that of arresting and detaining suspects to be handed over to the civil authorities for trial, but no power to try or punish civilians for insurrection or other crimes. The trial of the petitioner by court-martial was, therefore, declared void, but he was remanded to the custody of the militia to be handed over to the civil authorities. The view that the militia may detain suspects is upheld by the decisions of the Supreme Court of the United States, and of Colorado, in the famous cases growing out of the holding of Moyer by the State militia during the disorders at Cripple Creek,[12] but is open to criticism as permitting imprisonment of suspects for an indefinite time at the discretion of the military authorities, while preventing the latter from making examples of those who defy their authority and the laws of the State by such summary trial and punishment as would be most effective, if not essential, at such a time of public danger and lawless defiance of every legal authority.

If it clearly appears that the civil authorities are unable to cope with the situation, that the courts are defied by armed insurgents, or are unable to mete out justice through sympathy with one or another of the warring factions, and that the trial and punishment of offenders by court-martial is necessary to the re-establishment of peace, then the military authorities should be left in complete control and allowed every means to crush anarchy by effective martial law. But the rigors of such a regime should be applied only as a desperate last resource in the very greatest emergencies, and a resort for light and transient causes to martial law, involving, as it does, a suspension of constitutional guarantees, cannot be too heartily condemned.

MUNICIPAL TAXATION FOR PUBLIC PURPOSES.—During the nineteenth century, the scope of municipal enterprise in England was greatly

[10]See 24 Yale Law Journ. 189, 193. The constitutions of Massachusetts, New Hampshire, Rhode Island, and South Carolina, recognize the possibility of martial law, but do not define it as extending to a suspension of constitutional guarantees, and most State constitutions expressly provide for the supremacy of the civil over the military power.

[11]Nance and Mays *v.* Brown, *supra*, pp. 521, 522.

[12]Moyer *v.* Peabody (1909) 212 U. S. 78; *In re* Moyer (1905) 35 Col. 159.

enlarged, particularly after the passage of the Municipal Corporations Act, until, under the guise of "municipal trading", great inroads were made on what had been considered formerly the exclusive realm of private undertaking. A similar tendency was manifest in this country, although it never attained such formidable proportions, because written constitutions impose upon our legislatures limitations and restrictions by which the English Parliament is unfettered.[1] The power of a municipality to conduct its affairs depends primarily upon the ability to tax, conferred upon it by the legislature.[2] But to be constitutional, taxation in America must be levied for a purpose which is public.[3] American courts have looked askance at the efforts to extend governmental activities, and the category of purposes recognized as public at the adoption of the particular constitution invoked, has, in the main, been extended comparatively little.[4]

As might be expected, judges have not always agreed either as to what constitutes a purpose by nature public,[5] or as to whether a given set of facts brings a particular case under the heading of one of those purposes.[6] Municipal purposes now considered public, include the maintenance of highways,[7] and a public educational system,[8] and the supplying of water and light to the municipality itself or the inhabitants thereof.[9] Other purposes for which attempts are occasionally made to levy municipal taxes are obviously private, and taxes for these have been uniformly declared unconstitutional.[10] Between the

[1]See 3 Dillon, Municipal Corporations (5th ed.) §§ 1291, 1292.

[2]4 Dillon, Municipal Corporations (5th ed.) §§ 1350, 1375-1377.

[3]1 Cooley, Taxation (3rd ed.) 84; Lowell *v.* City of Boston (1873) 111 Mass. 454.

[4]*Cf.* Opinions of the Justices (1892) 155 Mass. 598.

[5]In Opinion of the Justices (1890) 150 Mass. 592, furnishing electric light to citizens was held to be a public purpose, but in Mauldin *v.* City Council (1889) 33 S. C. 1, the opposite result was reached. In Baltimore *v.* Keeley Institute (1895) 81 Md. 106, an act providing for the medical treatment of pauper drunkards in a private institution, at public expense, was held valid; but in Wisconsin Keeley Institute *v.* Milwaukee County (1897) 95 Wis. 135, a similar statute was declared unconstitutional.

[6]In State *v.* Nelson County (1890) 1 N. Dak. 88, it was held that supplying seed grain to needy farmers was a public purpose, because intended for the "necessary support" of the poor; but in State *v.* Osawkee Township (1875) 14 Kan. 418, and in Wm. Deering & Co. *v.* Peterson (1898) 75 Minn. 118, supplying such grain was held to be no part of the poor relief.

[7]1 Cooley, Taxation (3rd ed.) 212-217. The constitutionality of the acts under which the New York subway was constructed, was upheld largely on the ground that such a railroad is a public highway for a "city purpose." See Sun Publishing Assn. *v.* Mayor (1897) 152 N. Y. 257, 267.

[8]1 Cooley, Taxation (3rd ed.) 198-204. But to be constitutional, a tax levied by a municipality for the support of schools must be intended to benefit only those schools which are public, and under the control of the municipal authorities. Jenkins *v.* Andover (1869) 103 Mass. 94; Curtis's Adm'r. *v.* Whipple (1869) 24 Wis. 350.

[9]1 Cooley, Taxation (3rd ed.) 217; Opinion of the Justices (1890) 150 Mass. 592; Hequembourg *v.* City of Dunkirk (N. Y. 1888) 49 Hun 550; State *v.* City of Toledo (1891) 48 Ohio St. 112.

[10]A municipality cannot tax its inhabitants to assist a private corporation, even if benefits would result to the town and the inhabitants. Loan Assn.

two extremes, is found a debatable ground where many of the judicial conflicts have occurred.[11] An excellent illustration of this judicial divergence is furnished by a comparison with several other decisions, of the recent case of *Laughlin v. City of Portland* (1914) 111 Me. 846, in which the right of a municipality to construct and operate a municipal fuel yard, was held constitutional.[12] It is impossible to formulate an exact definition of public purpose which will be invariably accurate, but it seems safe to assert that in determining whether the purpose for which a municipal tax is levied is public, the court will be influenced by the need of the particular community for the proposed innovation, by the availability of private capital,[13] by the ability of private enterprise to supply the public need in times of emergency, by the danger arising from unscrupulous private monopoly and manipulation of commodities which are necessities,[14] and, in addition, not to be overlooked, by the individual ideas of political economy entertained by the different judges.

Public opinion seems to favor the extension of municipal enterprise.[15] The principal case indicates that the courts are responding to public sentiment,[16] and there is likely to be a gradual but persistent increase in the number of municipal undertakings, taxation for which will be held constitutional as furthering purposes public and municipal, founded "upon the ground of plain necessity or manifest public utility."[17]

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v. Topeka (1874) 20 Wall. 655; Allen *v.* Inhabitants of Jay (1872) 60 Me. 124. A tax levied by a municipality for the execution of a governmental function expressly delegated to the federal government, is illegal. Stetson *v.* Kempton (1816) 13 Mass. 272.

[11]Much confusion exists, for instance, over the constitutionality of municipal taxes laid to provide bounties for soldiers. *Cf.* Freeland *v.* Hastings (Mass. 1865) 10 Allen 570; Brodhead *v.* City of Milwaukee (1865) 19 Wis. *624; Bush *v.* Supervisors (1899) 159 N. Y. 212.

[12]Massachusetts declared at first that fuel yards conducted by a municipality would be an unwarranted governmental invasion of the field of private enterprise, Opinions of the Justices (1892) 155 Mass. 598, but later admitted that, under stress of sudden emergency, a municipality might supply its citizens with fuel temporarily. Opinion of the Justices (1903) 182 Mass. 605. Michigan has adopted this qualified view of the Massachusetts court. Baker *v.* City of Grand Rapids (1906) 142 Mich. 687. The principal case, although acquiescing in the emergency theory of the Massachusetts court, holds squarely that the sale of fuel by a municipality to its inhabitants is a public purpose.

[13]See Sun Publishing Assn. *v.* Mayor (N. Y. 1896) 8 App. Div. 230.

[14]*Cf.* Opinion of the Justices (1903) 182 Mass. 605; Baker *v.* City of Grand Rapids, *supra.*

[15]See 2 Virginia Law Rev. 152. The public markets recently established in New York City have met with popular approval, and have accomplished a substantial saving in money to many of the inhabitants. The establishment of a municipal ice plant has been agitated several times in New York City.

[16]*Cf.* Holton *v.* City of Camilla (1910) 134 Ga. 560, in which the establishment of a municipal ice plant was declared constitutional. Note that the case was decided without reliance upon the emergency doctrine of the Massachusetts court.

[17]See 3 Dillon, Municipal Corporations (5th ed.) § 1291.

RECENT DECISIONS.

ARNOLD BROCK, *Editor-in-Charge.*
CYRIL J. CURRAN, *Associate Editor.*

ADMIRALTY—MARITIME LIENS—SUPPLIES FURNISHED BY PART OWNER.—A stockholder and director of a steamship corporation furnished supplies to the company for use on one of its boats. *Held,* he is not entitled to a lien as against strangers who have liens on the vessel. *The Cimbria* (D. C. N. J. 1914) 214 Fed. 131.

Although a part owner of a boat is ordinarily not a partner but merely a tenant in common, Burdick, Partnership (2nd ed.) 26; *Ex parte Young* (1813) 2 Ves. & B. 242; *Petrie* v. *Steam Tug Coal Bluff No. 2* (D. C. 1880) 3 Fed. 531; *contra, Doddington* v. *Hallet* (1750) 1 Ves. Sr. *497, where circumstances appear showing that a partnership was actually intended, a partner has been accorded a maritime lien on the vessel. *Mumford* v. *Nicoll* (N. Y. 1822) 20 Johns. *611, *634. It has been intimated that a stockholder of a maritime corporation is a part owner of its vessels. See *The Queen of St. Johns* (C. C. 1886) 31 Fed. 24. This is obviously contrary to fact, and no reason can be assigned for refusing to allow a stockholder a lien on boats which he supplied relying thereon for compensation, although such boats were owned by the company. *The City of Camden* (D. C. 1906) 147 Fed. 847. Where, however, the stockholder is at the same time an officer or director of the corporation, knowledge of the condition of its affairs should preclude him from relying on the vessel rather than on the credit of the company, and he will accordingly be refused a lien. *The Murphy Tugs* (D. C. 1886) 28 Fed. 429; *The St. Joseph* (D. C. 1869) Fed. Cas. No. 12,229. It is difficult to see why this same reasoning should not be invoked to prevent the acquisition of a lien by a partner. Where the alleged lien of the stockholder conflicts with those of creditors of the corporation, as in the principal case, a court of admiralty, acting on equitable principles, see *Petrie* v. *Steam Tug Coal Bluff No. 2, supra,* is justified in postponing it until those creditors are satisfied. *The Murphy Tugs, supra.*

ATTACHMENT—PROPERTY IN ESTATE OF FOREIGN DECEDENT.—The plaintiff, a creditor of a foreign decedent, attached personal property which was situated in New York belonging to the estate. *Held,* the attachment should be vacated. *Bostwick* v. *Carr* (App. Div. 1914) 52 N. Y. L. J. 75. Not yet reported.

It has been established that an executor or administrator is not subject to attachment or garnishment proceedings in his representative capacity, at the suit of the decedent's creditors. *Matter of Hurd* (N. Y. 1833) 9 Wend. 465; *Jordan* v. *Landram* (1910) 35 App. D. C. 89. This is explained on the ground that such proceedings are an encroachment by the common law courts upon the prerogatives of the courts of probate and administration, which would tend to embarrass and delay the settlement of the decedent's estate. *Jordan* v. *Landram, supra.* It is also said that attachments are inconsistent with the fundamental principles of probate law, which contemplate equality of distribution and look with disfavor upon the establishment of a virtual preference in favor of any one creditor by means of the lien of an

attachment. *Levy* v. *Succession* (1886) 38 La. Ann. 9. In view of these objections to the levying of attachments upon the assets of a decedent's estate, the right to their institution should be denied in absence of express legislative provision authorizing their use, and since § 1836a of the New York Code of Civil Procedure, invoked in the principal case, which gives a cause of action against a non-resident executor and administrator as though they were ordinary non-residents, does not specifically provide for the bringing of execution or attachment proceedings against a personal representative, the court would appear to have decided correctly in vacating the attachment. Nevertheless, such proceedings are permitted in Kansas, where the statute is similar to that in the principal case. *Cady* v. *Bard* (1879) 21 Kan. 667. In Massachusetts and certain other jurisdictions attachment against the property of a decedent estate is specifically authorized by statute. See *Herthel* v. *McKim* (1906) 190 Mass. 522.

Bankruptcy—Right of Trustee to Sell Free From the Dower Interest of Wife.—A trustee in bankruptcy, under order of the bankruptcy court, sold real estate free and discharged of all liens. It did not appear when the inchoate right of dower in the wife of the bankrupt attached. *Held,* such dower interest was not divested by the sale. *In re Chotiner* (D. C. Pa. 1914) 216 Fed. 916.

Under the Bankruptcy Acts of 1841 and 1898 the dower right of the wife is saved by express provisions, *Worcester* v. *Clark* (Pa. 1853) 2 Grant. 83; *In re Shaeffer* (D. C. 1900) 105 Fed. 352, and although these provisions were omitted from the act of 1867, it was held that dower was still unaffected on the ground that only such estate and rights as the bankrupt had passed to the trustee. *In re Angier* (D. C. 1871) 1 Fed. Cas. 914; *Porter* v. *Lazear* (1883) 109 U. S. 84. The Amendment of 1910, § 47a (2), however, provides that the trustee "as to all property in the custody or coming into the custody of the Bankruptcy Court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon." While the purpose of the amendment was primarily to give the trustee a valid title against a claim under an unrecorded conditional sale, it is not to be so limited in its application, see *In re Whatley Bros.* (D. C. 1912) 199 Fed. 326, and since in Pennsylvania the dower right of the wife is barred by a judicial sale of her husband's property, *Directors of the Poor* v. *Royer* (1862) 43 Pa. 146, it would seem that in that State, by virtue of the amendment, a sale by the trustee under order of the Bankruptcy Court should pass title free from the dower interest. *In re Codori* (D. C. Pa. 1912) 207 Fed. 784; *Matter of Freedman* (D. C. Pa. 1913) 31 Am. Bank. Rep. 53. It has been held, however, that the Amendment does not affect rights which were good against the trustee prior to its passage, *Arctic Ice Co.* v. *Armstrong Trust Co.* (C. C. A. 1911) 192 Fed. 114; *Holt* v. *Henley* (1914) 232 U. S. 637, and hence, if in the principal case the dower interest of the wife attached before the Amendment was passed, the result reached would seem justifiable.

Carriers—Injury to Persons on Tracks—Implied Licensees.—Notices forbidding trespassing were posted on a railroad bridge, but they were constantly disregarded by the public. The plaintiff was struck by one of the defendant company's trains while walking over the bridge. *Held,* the jury might find that the company acquiesced in such user

and that, therefore, the person injured was a licensee. *Doyle* v. *Portland Ry. etc. Co.* (Ore. 1914) 143 Pac. 623.

Where the public has been accustomed to pass over the tracks of a railroad for a long period of time with the acquiescense of the railroad company, a license so to do may be implied; 8 Columbia Law Rev. 317; and in that event it has been held that the railroad company must use due care to protect such licensees. See p. 184, *infra.* This implication of acquiescence may be negatived, however, when it would be unreasonable to suppose that the company had given its assent. No license is to be implied, therefore, however frequent the custom might be, to pass underneath freight cars, *Central R. R. etc. Co.* v. *Rylee* (1891) 87 Ga. 491, or to cross a long narrow trestle so constructed that a person thereon could not step aside to avoid a train, *Texas Midland R. R.* v. *Byrd* (1909) 102 Tex. 263, since in both cases it would materially handicap the railroad in its movement of trains. On the other hand, merely posting signs forbidding the public to go upon railroad premises should not in itself convert their status of implied licensees to that of trespassers. *Missouri etc. Ry.* v. *Sharp* (Tex. 1909) 120 S. W. 263; but see *Lamb* v. *Southern Ry.* (1910) 86 S. C. 106. Signs forbidding trespassing are undoubtedly evidence of lack of acquiescence on the part of the railroad, but the weight of authority sanctions the view set forth in the principal case, that their effect may be entirely negatived by evidence of the fact that they were constantly disregarded without other objection by the railroad company. *O'Connor* v. *Boston etc. R. R.* (1883) 135 Mass. 352; *International etc. R. R.* v. *Brooks* (Tex. 1899) 54 S. W. 1056; *Great Northern R. R.* v. *Thompson* (C. C. A. 1912) 199 Fed. 395; *Dublin etc. Ry.* v. *Slattery* (1878) 3 App. Cas. 1155.

Carriers—Injuries to Persons on Tracks—Trespassers and Licensees.—While walking over a railroad bridge commonly used by the public, the plaintiff was struck by one of the defendant company's trains. *Held,* the plaintiff was a licensee and the railroad was bound to exercise ordinary care to discover him. *Doyle* v. *Portland Ry. etc. Co.* (Ore. 1914) 143 Pac. 623.

A railroad company has exclusive use of its property where it does not occupy a highway, and persons coming upon such property without permission, express or implied, are trespassers. See 10 Columbia Law Rev. 569. Generally the duty of a landowner to trespassers is merely negative, to refrain from wilfully inflicting injury upon them after learning of their peril. Burdick, Torts (3rd ed.) 518. In the case of a licensee, who takes the premises as he finds them, the only added duty of the landowner is to warn him of hidden dangers. Burdick, Torts (3rd ed.) 516. It is urged, therefore, that a licensee upon railroad property, since he cannot reasonably be unaware of the dangers of his position, should be required to look out for his own safety. 3 Elliott, Railroads (2nd ed.) § 1250. There are numerous cases, however, which require reasonable care on the part of the railroad company to discover persons upon its tracks, where because of constant use by the public such persons are said to be implied licensees. *Byrne* v. *New York Cent. etc. R. R.* (1887) 104 N. Y. 362; *Teakle* v. *San Pedro etc. R. R.* (1907) 32 Utah 276; *Thomas* v. *Chicago etc. Ry.* (1897) 103 Ia. 649. In other jurisdictions, upon humanitarian grounds, the courts require the railroad to exercise special care at points where it knows, or should know, that its right

of way is invaded by the public, whether persons injured at such points are to be regarded as trespassers or licensees. *Great Northern Ry.* v. *Thompson* (C. C. A. 1912) 199 Fed. 395; *Ahnefeld* v. *Wabash R. R.* (1908) 212 Mo. 280.

Constitutional Law — Carriers — Separate Accommodations for Negroes.—A Separate Coach Law of Kentucky, prohibiting railroads from discriminating in the quality of accommodations in the cars set apart for white and colored passengers, contained no mandate as to the furnishing of privies upon passenger trains. The defendant was indicted because of differences in the conveniences of privies set apart for negroes. *Held,* the volume of negro traffic being comparatively light, and there being a substantial equality in accommodations, there was no discrimination. *Louisville & N. R. R.* v. *Commonwealth* (Ky. 1914) 170 S. W. 162.

A similar statute in Oklahoma further provided that the carrier could haul sleeping, dining and chair cars exclusively for white persons. *Semble,* the provision is offensive to the Fourteenth Amendment, the argument with respect to the volume of traffic being without merit. *McCabe et al.* v. *Atchison, T. & S. Fe. Ry. et al.* (U. S. Sup. Ct., October Term 1914. No. 15) Not yet reported.

Upon the theory that a carrier of passengers may make and enforce reasonable rules and regulations for the conduct of its business, it is well established that a carrier, independent of any statutory authority, may require colored persons, solely because of their color, to occupy compartments set apart for those of this race, provided, however, no discrimination be made in the quality of accommodations. *Bowie* v. *Birmingham Ry. etc. Co.* (1899) 125 Ala. 397; *West Chester etc. R. R.* v. *Miles* (1867) 55 Pa. St. 209; *Chesapeake etc. Ry.* v. *Wells* (1887) 85 Tenn. 613. And since the Fourteenth Amendment is prohibitory simply of state legislation, *Civil Rights Cases* (1883) 109 U. S. 3, this regulation does not contravene any constitutional provision and the question whether or not it abridges any privilege or immunities of citizens is not involved. *Chilton* v. *St. Louis & I. M. Ry.* (1892) 114 Mo. 88. The weight of authority, moreover, upholds even state statutes which require railroads to provide separate but equal facilities for white and colored persons, provided their operation be confined to intrastate commerce, *Chesapeake & O. Ry.* v. *Kentucky* (1900) 179 U. S. 388, on the ground that a State in order to preserve order and decorum may in the valid exercise of its police power make color alone a basis for classification. *Ex parte Plessy* (1893) 45 La. Ann. 80; *Plessy* v. *Ferguson* (1896) 163 U. S. 537; *Ohio Valley Ry's. Receiver* v. *Lander* (1898) 104 Ky. 431. Congress may, however, in granting a railroad permission to engage in interstate commerce, require as a condition precedent that colored persons be allowed to ride in the same cars as whilte persons. *Railroad* v. *Brown* (1873) 17 Wall. 445. Doubtless, whether or not the carrier shall provide particular facilities is conditioned upon there being a reasonable demand therefor, but since the statute in Oklahoma made no provisions at all for the accommodation of negroes, it is violative of the Fourteenth Amendment. *Cf. Chicago etc. Co.* v. *Williams* (1870) 55 Ill. 185.

Constitutional Law—Power of Congress to Protect Migratory Birds.—The migratory bird provision of the act of March 4th, 1913, c. 145, 37 U. S. Stat. L. 847, *held,* unconstitutional since it was not

passed in pursuance of the expressed or necessarily implied powers granted to Congress by the Constitution. *United States* v. *Shauver* (D. C. E. D. Ark. 1914) 214 Fed. 154.

It is well settled in this country, that the several States hold the game within their boundaries for the benefit of their citizens, and under the police power may regulate not only the manner in which such game may be taken, but also the nature of the property right acquired when taken. *Geer* v. *Connecticut* (1896) 161 U. S. 519; *State* v. *Rodman* (1894) 58 Minn. 393, 400; *American Express Co.* v. *People* (1890) 133 Ill. 649. The power so to do is not impaired even though such legislation may indirectly affect interstate commerce. *Geer* v. *Connecticut, supra; Silz* v. *Hesterberg* (1908) 211 U. S. 31. Since, then, migratory birds considered as game, come under the ownership of the several States, it is difficult to see how they can be a subject for congressional legislation under Art. 4, § 3, (2), giving the federal legislature power to enact laws for property belonging to the United States; and the argument that the migration of birds in itself constitutes interstate commerce is more ingenious than convincing. The court in overruling both of these arguments was undoubtedly correct on authority and also on principle, for beneficial and desirable as such legislation may be, it is now too well settled to admit of doubt, that Congress may exercise only such powers as are expressly granted in the Constitution or necessarily flow therefrom. See *Kansas* v. *Colorado* (1907) 206 U. S. 46, 87.

Constitutional Law — Taxation — Municipal Fuel Yards.—The legislature authorized municipalities to tax inhabitants for the establishment and maintenance of a municipal fuel yard, after an affirmative vote upon the proposition by the inhabitants. *Held,* since the tax is for a public purpose, it is constitutional. *Laughlin* v. *City of Portland* (1914) 111 Me. 486. See Notes, p. 179.

Contracts—Illegality—Relief.—The plaintiff, induced by fraudulent representations of the defendant, entered into an illegal contract looking to the control of a certain corporation and, pursuant to the agreement, conveyed real estate in part payment for shares of stock. He now seeks to have the deed of conveyance annulled. *Held,* in view of the public policy to thwart fraudulent promoting schemes, equity will afford relief to the plaintiff by ordering a reconveyance of title. *Gilchrist* v. *Hatch* (Ind. 1914) 106 N. E. 694. See Notes, p. 175.

Contracts—Pleading—Averment and Proof of Compliance with Law.—A statute made it a misdemeanor for any person to practice architecture without a certificate. In an action upon contract for services rendered as an architect, it was not alleged or shown that the plaintiff had a certificate. *Held,* the defendant must plead and prove non-compliance with the statute to defeat recovery on that ground. *Harris* v. *Bucher* (Cal. 1914) 143 Pac. 796.

It is well settled that there can be no recovery by a plaintiff for goods sold or services rendered unless all occupational requirements intended to protect public interests have been satisfied. *Ferdon* v. *Cunningham* (N. Y. 1866) 20 How. Pr. 154; *Kenedy* v. *Schultz* (1894) 6 Tex. Civ. App. 461; *Murray* v. *Williams* (1904) 121 Ga. 63. But with reference to the question upon whom the burden of proving compliance or non-compliance rests, the authorities are in conflict. The majority of courts, while not expressly holding that compliance is an

essential element of the plaintiff's case, hold that where the acts are required by positive law, the omission of which would be a criminal offense, the presumption that they are accordingly performed makes a *prima facie* case for the plaintiff, and imposes on the defendant the burden of producing evidence of non-compliance. *Cather* v. *Damerell* (Neb. 1904) 99 N. W. 35; *Leggat* v. *Gerrick* (1907) 35 Mont. 91; but see *Lanzer* v. *Unterberg* (N. Y. 1894) 9 Misc. 210. Since proof of the services rendered in the principal case was sufficient to support the action at common law, and since recovery is denied to an unlicensed plaintiff, not because of any illegality inherent in the transaction, but on the ground of public policy, where non-compliance does not appear on the face of the complaint the fact that the plaintiff was unlicensed would be an affirmative defense to be pleaded and proved by the defendant, *Wilson* v. *Melvin* (1859) 79 Mass. 73; *Lyford* v. *Martin* (1900) 79 Minn. 243; *Webster* v. *Lamb* (1902) 15 S. Dak. 292; *contra, Adams* v. *Stewart* (1848) 5 Del. 144, unless the license is expressly made a condition precedent to plaintiff's right to sue. *Cooper* v. *Griffin* (1895) 13 Ind. App. 212; *Westbrook* v. *Nelson* (1902) 64 Kan. 436.

Contracts—Rescission—Innocent Misrepresentations.—Relying on and induced by the defendant's representations as to the financial condition of a corporation, the plaintiff purchased a large amount of its stock. These representations were, in fact, false, although the defendant believed them to be true. *Held,* equity will grant relief for such innocent misrepresentations by rescinding the executed contract. *Canadian Agency Ltd.* v. *Assets Realization Co. et al.* (N. Y. App. Div., 1st Dept. 1914) 52 N. Y. L. J. 1163.

It is well established that a contract induced by willful misrepresentations will be rescinded, the plaintiff's equity in such cases being the fraud practiced upon him by the defendant. Anson, Contracts (11th ed.) 217. Where the misrepresentations are innocently made, moreover, this fact will be a good defense to an action for specific performance. *Boynton* v. *Hazelboom* (Mass. 1867) 14 Allen 107. But where the contract is executed and affirmative relief is demanded, the grounds for equitable interference are not so clear. One reason is that it is inequitable to allow one to benefit by his false statements without which the contract would never have been formed, at least under the same terms. *Redgrave* v. *Hurd* (1881) L. R. 20 Ch. Div. 1; see *Spurr* v. *Benedict* (1868) 99 Mass. 463; *Hammond* v. *Pennock* (1874) 61 N. Y. 145, 152. Then, too, there is frequently only inadequate relief at law in an action for breach of warranty, because of the difficulty of assessing damages. Finally, a further equity may be found in the mutual mistake resulting from the misrepresentation, although such mutual mistake may not so destroy the subject matter of the contract, and thereby prevent a meeting of the minds, as to furnish in itself grounds for rescission. The principal case in allowing rescission furnishes a square holding on a principle often alluded to in this country by way of dictum, in cases, however, that nearly always are decided on other grounds. *Smith* v. *Richards* (1839) 13 Pet. 26; *Black* v. *Walton* (1877) 32 Ark. 321, 326; but see *Turner* v. *Ward* (1876) 154 U. S. 618. Furthermore, in granting relief, the court draws no distinction, as was formerly done between executory and executed contracts. See *Belknap* v. *Lealey* (1856) 14 N. Y. 143; *Matthey* v. *Wood* (Ky. 1876) 12 Bush. 293.

COURTS—JURISDICTION—ACTION CONCERNING LAND IN FOREIGN STATE.—Suit was brought in Maryland to recover damages for the negligent destruction by fire of some buildings and their contents in West Virginia. *Held,* the court had jurisdiction of so much of the action as related to the destruction of the contents of the buildings, but could not take cognizance of the destruction of the buildings themselves. *Potomac Milling & Ice Co.* v. *Baltimore & Ohio R. R.* (D. C. Md. 1914) 217 Fed. 665. See Notes, p. 169.

COVENANTS—COVENANTS RUNNING WITH THE LAND RELATING TO THINGS NOT IN ESSE—SPECIFIC PERFORMANCE.—The plaintiff's ancestors conveyed a right of way to a railroad company, which covenanted to erect and maintain a flag station, but did not mention assigns in the instrument. *Semble,* the covenant is specifically enforcible against the assignee of the railroad company. *Parrott* v. *Atlantic & N. C. R. R.* (N. C. 1914) 81 S. E. 348.

It was resolved in *Spencer's Case* (1583) 5 Co. *16a, that a covenant which touches and concerns the land but relates to a thing not *in esse,* will not run with the land unless assigns be named in the grant or demise. The reason for this somewhat arbitrary and metaphysical qualification is difficult to ascertain, see Platt. Covenants, 471, and the binding force of the rule has been further shaken by the suggestion that *Spencer's Case,* as actually decided, stands for the directly opposite proposition (1584) Moore 159, and that the resolution of Lord Coke upon this point, is, therefore, a mere dictum. *Minshull* v. *Oakes* (1858) 2 H. & N. *793. The rule has nevertheless been strictly followed in New York, *Thompson* v. *Rose* (N. Y. 1828) 8 Cow. 266; *Ovington* v. *Henshaw* (N. Y. 1905) 47 Misc. 167, affirmed 115 App. Div. 886, and in other jurisdictions of this country. *Maryland etc. R. R.* v. *Silver* (1909) 110 Md. 510. By the weight of American authority, however, the omission of the word "assigns" will not preclude the running of a covenant relating to things not *in esse,* provided the intent to bind grantees or assignees is otherwise shown in the grant or demise. *Sexauer* v. *Wilson* (1907) 136 Ia. 357; see *Masury* v. *Southworth* (1859) 9 Oh. St. 340. The point seems undecided in England where some judges have followed precedent, *Grey* v. *Cuthbertson* (1782) 2 Chit. 482; *Doughty* v. *Bowman* (1848) 11 Q. B. 444, while others have rejected the distinction as unsound. *Smith* v. *Arnold* (1700) 3 Salk. *4; *Minshull* v. *Oakes, supra.* The courts of equity, with their tendencies to break away from arbitrary technicalities, appear to have rejected the orthodox rule as well, *Kelly* v. *Nypano etc. R. R.* (1899) 23 Pa. Co. Ct. 177, in accordance with the principal case.

CRIMINAL LAW—PLEADING AND PRACTICE—INSTRUCTING JURY AS TO PENALTY.—On a trial for murder, the judge charged the jury as to the punishment for first degree murder, but not as to that for second degree murder and manslaughter. The jury convicted of second degree murder. Under the rule of the jurisdiction, punishment was fixed by the court. *Held,* while the trial court may instruct the jury as to the penalty, failure to do so is not error. *State* v. *Inlow* (Utah 1914) 141 Pac. 530.

Where statutes give the jury power to assess punishment for a crime, it is necessary for the judge to instruct the jury as to the possible punishment which the law prescribes, *People* v. *Sainz* (1912)

162 Cal. 242, but where the court imposes the penalty, which is the usual situation, no such necessity appears. *People* v. *Ryan* (N. Y. 1889) 55 Hun 214; *Caudill* v. *Commonwealth* (1913) 155 Ky. 578. It is intimated in the principal case, however, that such instructions may be desirable in order to induce the jury, in considering the evidence, to exercise care commensurate with the severity of the consequences of conviction. If this is done, however, the jury may use its knowledge of the penalty to adapt its verdict to what it deems adequate punishment for the defendant, thereby perverting its duty to determine merely the fact of guilt or innocence, and to that extent making the penalty for crime dependent upon the will of the jury, instead of the legislature. See *Bliss* v. *State* (1903) 117 Wis. 596; *State* v. *Garrison* (1911) 59 Ore. 440. The jury should not convict or acquit on the basis of the lightness or severity of the authorized punishment, *State* v. *Peffers* (1890) 80 Ia. 580; *Ford* v. *State* (1895) 46 Neb. 390, and the possibility of compromise verdicts have led some courts to declare instructions as to punishment reversible error. *Commonwealth* v. *Switzer* (1890) 134 Pa. 383; *Ellerbe* v. *State* (1901) 79 Miss. 10. Whatever may be said as to the policy of such instructions, the decision in the principal case seems sound, that failure to give such instructions is not error. *Johnson* v. *State* (1900) 78 Miss. 627; *Williams* v. *People* (1902) 196 Ill. 173.

Criminal Law—Presence of Defendant at Rendition of Verdict—Waiver.—Counsel, without the defendant's knowledge or consent, waived his presence at the reception of the verdict. The defendant later made a motion for a new trial, which did not contain this fact as a ground for new trial. *Semble*, that this amounted to such an acquiescence in the waiver by counsel as to preclude its use as a basis for a subsequent motion to set aside the verdict as unconstitutional. *Frank* v. *State* (Ga. 1914) 83 S. E. 645. See Notes, p. 166.

Divorce—Right to Trial by Jury—Waiver.—A motion to have the issue of adultery in a divorce suit tried by a jury was made more than 20 days after issue joined. *Held*, the motion should be granted, since Rule 31 of the General Rules of Practice, in so far as it provides that the right to trial by jury is waived unless the motion be made within 20 days after issue joined, is invalid. *Moot* v. *Moot* (N. Y. 1914) 83 Misc. 495, affirmed (N. Y. App. Div. 3rd Dept.) 149 N. Y. Supp. 901.

The New York Constitution, Art. 1, § 2, provides that, "the trial by jury in all cases in which it has been heretofore used shall remain inviolate forever," but "may be waived * * * in all civil cases in the manner to be prescribed by law." This positive right to trial by jury extends to the issue of adultery in divorce proceedings. Code Civ. Proc. § 1757; *Conderman* v. *Conderman* (N. Y. 1887) 44 Hun 181. The Code, § 1009, provides that the right may be waived in one of several ways, but in that statute there is no time limit set for the making of the motion for a jury trial. Under the same constitutional and code provisions, but before Rule 31 was formulated as it now stands, the motion to have the issue of adultery tried by a jury could be made at any time before trial, unless waived under § 1009 of the Code. *Wilcox* v. *Wilcox* (N. Y. 1906) 116 App. Div. 423; see dissent in *Cohen* v. *Cohen* (N. Y. 1914) 160 App. Div. 240. Thus the rule, by setting a time limit for making the motion, attempts to alter a

constitutional right, which it may not do. *Rice* v. *Ehele* (1874) 55 N. Y. 518; *Glenney* v. *Stedwell* (1876) 64 N. Y. 120. And inasmuch as the limitation in the rule adds to § 1009 of the Code, one more manner in which the party forfeits his right to a jury trial, it also violates the provision of the statute that gave authority to enact the General Rules of Practice which expressly states that none of the rules shall be contrary to the Code of Civil Procedure. § 94 Judiciary Law, ch. 30, Consolidated Laws. Accordingly the rule has been unanimously held invalid in the Second Department, *Halgren* v. *Halgren* (N. Y. 1914) 160 App. Div. 477, which decision with that in the principal case represents a more just and logical view than that adopted by the First Department in *Cohen* v. *Cohen, supra.*

Elections—Filing Fees—Constitutionality.—A candidate for the office of Secretary of State refused to pay the filing fee for nominations, claiming that the statute requiring such fees was unconstitutional. In mandamus proceedings to compel the Secretary of State to file the papers, *held,* that the requirement of a fee of $100. is not unreasonable nor does it impose a property qualification to hold public office. *State ex rel. Riggle* v. *Brodigan* (Nev. 1914) 143 Pac. 238.

The legislature, except as restricted by the Constitution, has the right to name qualifications for public office. See 10 Columbia Law Rev. 350. Some legislatures, in order to prevent an indiscriminate scramble for office, have required that candidates pay filing fees of more than a nominal sum. The courts of some jurisdictions have held such legislation a valid exercise of this power, and have declared that it does not impose a property qualification on the right to hold office. *State* v. *Scott* (1906) 99 Minn. 145; *Socialist Party* v. *Uhl* (1909) 155 Cal. 776. Such statutes do, however, make the ability to pay money a prerequisite, and they would therefore seem to affix a property qualification, *Ledgerwood* v. *Pitts* (1909) 122 Tenn. 570; *People* v. *Election Commissioners* (1906) 221 Ill. 9, and impair the right of the electorate to choose its candidates. *State* v. *Drexel* (1905) 74 Neb. 776. A filing fee should be uniform and nominal, and its only purpose should be to pay for the service of filing records. *Ballinger* v. *McLaughlin* (1908) 22 S. D. 206. When substantial fees are imposed to help defray election expenses, it is on the theory that those who seek the benefits must reimburse the State; *State* v. *Nichols* (1908) 50 Wash. 508; see *Kenneweg* v. *Allegany County* (1905) 102 Md. 119; but an unreasonable burden is thus placed upon candidates who do not seek office for personal advantage but rather to benefit the State. *Johnson* v. *Grand Forks County* (1907) 16 N. D. 363. Fees of more than nominal amounts are furthermore contrary to public policy inasmuch as they discourage and eliminate all effort by minority parties and thus place complete governmental power in the dominant party. *Johnson* v. *Grand Forks County, supra.*

Evidence—Declarations—Alienation of Affections.—In an action against the plaintiff's father-in-law for alienating the affections of the plaintiff's wife and enticing her away, the defendant offered in evidence a letter written by the plaintiff's wife to her mother before the abandonment, charging mistreatment by the plaintiff and stating that she intended to leave him. *Held,* the letter should have been admitted in evidence. *Willey* v. *Howell* (Ky. 1914) 169 S. W. 519.

In actions for the alienation of affections, where the state of mind

of one of the parties becomes a material fact to be ascertained, the declarations, either oral or written, of such party, if made at a time when there was no motive to deceive, are admissible as evidence of such state of mind. *Luick* v. *Arends* (1911) 21 N. Dak. 614; *Ickes* v. *Ickes* (1912) 237 Pa. 582; *Roesner* v. *Darrah* (1902) 65 Kan. 599. Although this rule has sometimes been confused with the doctrine of *res gestae*, *Kidder* v. *Lovell* (1850) 14 Pa. 214; *cf. Hardwick* v. *Hardwick* (1906) 130 Ia. 230, declarations of intent, motive, feeling, etc., properly regarded, are independent of the *res gestae* doctrine and constitute, in themselves, a separate exception to the Hearsay Rule. 3 Wigmore, Evidence, § 1726 (2); *Commonwealth* v. *Trefethen* (1892) 157 Mass. 180; *Ickes* v. *Ickes, supra.* Such declarations, however, cannot be used as evidence of other matters therein recited. As to these, they are mere hearsay, and the trial judge should instruct the jury that their probative value must be strictly limited to the state of mind of the party at the time of uttering the declaration. *Ickes* v. *Ickes, supra*; *Luick* v. *Arends, supra*; *Leucht* v. *Leucht* (1908) 129 Ky. 700. The principal case has been criticized as holding that the letter in question should have been admitted as evidence of the acts therein alleged. See 79 Cent. L. J. 340. All that it actually decides is that the complete exclusion of the letter was reversible error, a result which is manifestly sound. The real issue is shown to depend upon the wife's state of mind and the greater part of the decision is devoted to the relevancy of the letter on that issue. The so-called dictum near the end of the decision is really but a terse summing up of the unquestionably correct conclusion of the preceding reasoning.

Evidence—Testimony of Accomplice—Detectives.—Special agents of the Excise Commissioner induced the defendant hotel keeper to sell liquor to them on Sunday in violation of the Liquor Tax Law. The defendant claimed that the agents were accomplices and that their testimony must be corroborated to warrant conviction. *Held*, the agents were not accomplices. *Farley* v. *Bronx Bath & Hotel Co.* (1914) 148 N. Y. Supp. 579.

At common law the testimony of an accomplice need not be corroborated, but it was a rule of practice for the courts to caution the jury as to the effect to be given to such evidence. *Commonwealth* v. *Wilson* (1890) 152 Mass. 12; *Commonwealth* v. *Klein* (1910) 42 Pa. Super. Ct. 66; *Collins* v. *People* (1851) 98 Ill. 584. In New York and in many other States, however, corroboration is required by statute. See N. Y. Code Crim. Proc., § 399. A detective, acting in good faith may at times aid and counsel criminals in their plans for the commission of crime, but since he has no criminal purpose, his testimony is not governed by the same rule as that of an accomplice. *Commonwealth* v. *Wasson* (1910) 42 Pa. Super. Ct. 38; *Regina* v. *Mullins* (1848) 3 Cox C. C. 526; *Campbell* v. *Commonwealth* (1877) 84 Pa. 187. When artifices are adopted for the purpose of detecting persons suspected of violating the Liquor Law, even though the detective's acts may be said to induce, to some extent, the particular act for which conviction is sought, it appears that a detective, acting in good faith will not be regarded as an accomplice. *Salt Lake City* v. *Robinson* (Utah 1912) 125 Pac. 657; but see *Ford* v. *Denver* (1898) 10 Col. App. 500. In such cases, moreover, the statutes are directed against the seller and not against the purchaser of liquor. *Lyman* v. *Oussani* (1900) 68 N. Y. Supp. 450; *Commonwealth* v. *Willard* (1839)

39 Mass. 476; *State* v. *Baden* (1887) 37 Minn. 212. But while the evidence of a detective does not have to be corroborated, it is within the discretion of the court to give cautionary instructions as to its credibility. *O'Grady* v. *People* (1908) 42 Col. 312; *Salt Lake City* v. *Robinson, supra.*

Extradition—Habeas Corpus—Interstate Rendition.—In 1908 Thaw was acquitted in New York of the charge of homicide, on the ground of insanity, and was, under statutory authority, committed to the State Asylum for the Criminal Insane. In 1913 he escaped, was found in New Hampshire, and upon requisition of the governor of New York, the governor of New Hampshire issued a warrant for his arrest and rendition. On habeas corpus to test the validity of his detention, *held,* he was properly detained, and should be surrendered. *Ex parte Thaw* (U. S. Sup. Ct., October Term 1914. No. 514) Not yet reported.

For a discussion of this case in the United States District Court, criticising the decision of that court and reaching the same result as was reached in the principal case, see 14 Columbia Law Rev. 665.

Infants—Dependent Children—Marriage.—The juvenile court was by statute given jurisdiction over "dependent minor children under 18 years of age who habitually resort to any place where intoxicating liquors are sold." A girl of 17 whose marriage to a person of full age had been annulled, sang in a cafe. *Held,* she was within the jurisdiction of the juvenile court in spite of a statute which declared that "all females married to a person of full age shall be deemed and taken to be of full age." *In re Lundy* (Wash. 1914) 143 Pac. 885.

A minor may be emancipated by the act of his parent, *Robinson & Co.* v. *Hathaway* (1898) 150 Ind. 679, or by his marriage, *Bucksport* v. *Rockland* (1868) 56 Me. 22; see *State* v. *Lowell* (1899) 78 Minn. 166, and he thereby acquires freedom from parental control, *State* v. *Lowell, supra,* and a right to his earnings as against his parent, *Robinson* v. *Hathaway, supra.* But in the absence of statute he remains a minor, though emancipated, and acquires no political or municipal rights thereby. *Taunton* v. *Plymouth* (1818) 15 Mass. 203. Since a statute removing the disabilities of infancy is in derogation of the common law, it must be strictly construed. *Burr* v. *Wilson* (1857) 18 Tex. 367. For this reason the court, in the principal case, refuses to read into the statute of emancipation the words "for all purposes", and in effect reads into it "for certain purposes only". It would seem more reasonable to suppose that if the legislature had intended to limit the statute as suggested by the court, it would have specified for what purposes the woman was to be deemed of full age. As it is, it is difficult to see how one who "is to be deemed and taken to be of full age" can be a "minor dependent child". *Cf. Magee* v. *Welsh* (1861) 18 Cal. 156; *Ward* v. *Laverty* (1886) 19 Neb. 229; *Burr* v. *Wilson, supra,* p. 367. The court regards the annullment of the marriage as unworthy of discussion, but the decision could have been based with perfect soundness on this fact alone, rather than upon such a strained construction of the statute.

Liens—Priority—Judgment Liens on Real Estate.—An undivided share in certain real estate came by descent to one against whom several judgments had at different times before that been docketed.

Execution was issued upon one of the judgments and a sale had thereunder during the pendency of a suit to partition the land. *Held*, the purchaser under such execution sale is entitled to priority over the other judgment creditors in the distribution of the debtor's share of the proceeds of the partition sale. *Hulbert* v. *Hulbert* (N. Y. 1914) 86 Misc. 662. See Notes, p. 173.

MARTIAL LAW—POWERS OF MILITARY AUTHORITIES—TRIAL OF CIVILIAN BY COURT-MARTIAL.—After a declaration of martial law, the petitioner was detained by the militia to prevent his aiding the rioters, and was then tried by court-martial and sentenced to imprisonment. On an application for a writ of habeas corpus, *held*, that under a declaration of martial law the military authorities have power to detain suspects to prevent their fomenting disorder, but courts-martial have no jurisdiction to try civilians for any crime. *Ex parte* McDonald (Mont. 1914) 143 Pac. 947. See Notes, p. 177.

PLEADING AND PRACTICE—RESIDENCE—SECURITY FOR COSTS.—The plaintiff commenced an action in Nassau County and was at that time a resident of and domiciled in that county. Thereafter he closed his house and travelled from place to place on business, without establishing a residence at any particular place. *Held*, he is not a non-resident for the purpose of compelling him to give security for costs under § 3269 of the New York Code of Civil Procedure. *Ball* v. *Randall* (N. Y. 1914) 87 Misc. 194.

Whether one is a resident of a given place depends upon the purpose of the particular legislative classification under discussion. 12 Columbia Law Rev. 461. In attachment cases, the issuance of the warrant is governed by the accessibility of the defendant to personal service. Accordingly, although he is actually domiciled in the State, if he is absent therefrom at the time, since he is not then amenable to process, it seems that the warrant should issue even if he has not acquired a residence elsewhere. *Hanover Nat. Bank* v. *Stebbins* (N. Y. 1893) 69 Hun 308. This result is codified in the New York Code of Civil Procedure, § 636 (2), which declares that "where the defendant * * * has been without the State * * * for more than six months", a warrant of attachment is authorized. Following the same reasoning, it is held that a warrant of attachment, issued against a non-resident defendant who may be found in the State, will be vacated, since he is amenable to personal service. *Irwin* v. *Raymond* (N. Y. 1908) 58 Misc. 319. The purpose of providing for security for costs, on the other hand, is to protect a defendant from a plaintiff who resides in another State or county, and is accorded the privilege of using the courts of the State or county in which the defendant resides. A construction of the words "cease to be a resident" in such statutes to mean "be absent from", would disregard the object of the statute, for it would then apply to a resident who, during the pendency of an action, should leave the State or county for no matter how short a period of time. The decision in the principal case follows logically from this line of reasoning and is also supported by authority. *Taylor* v. *Norris* (N. Y. 1905) 104 App. Div. 21. Cases involving the suspension of the Statute of Limitations also construe the words "non-resident" to mean one who has actually acquired a residence elsewhere. *Pells* v. *Snell* (1889) 130 Ill. 379; *Hart* v. *Kip* (1896) 148 N. Y. 306.

Public Service Companies—Water Company—Regulations.—A water company adopted a rule by virtue of which the company turned off the water for non-payment of water rents and, for the expense thereby involved, required payment of a charge of one dollar before renewing service. *Held,* although the regular water rents reached the maximum rate permissible under the company's franchise, this additional charge was valid because it was not imposed for service contemplated by the franchise. *Sei* v. *Water Supply Co.* (N. M. 1914) 140 Pac. 1067.

A water company may make reasonable regulations pertaining to the use of its water supply, and may enforce such rules by shutting off the water. *Shiras* v. *Ewing* (1892) 48 Kan. 170; *Heironymous Bros.* v. *Bienville etc. Co.* (1901) 131 Ala. 447. The company may require payment of the water rent at a stated period as a condition precedent to the continuation of its service, *Tacoma Hotel Co.* v. *Tacoma etc. Co.* (1891) 3 Wash. 316, but the regulation cannot be used to make the water company the judge of its own case to enforce payment of disputed bills. *Spaulding Mfg. Co.* v. *Grinnell* (1912) 155 Ia. 500; *Birmingham Water Works Co.* v. *Keiley* (1911) 2 Ala. App. 629, and, if the charge so enforced has not lawfully accrued, the consumer's rights may be protected by injunction or mandamus. *Poole* v. *Paris Mountain Water Co.* (1908) 81 S. C. 438; *Cromwell* v. *Stephens* (N. Y. 1867) 2 Daly 15. The imposition of a charge for turning the water off and on has sometimes been held unreasonable, *American Water Works Co.* v. *State* (1895) 46 Neb. 194, but it would seem that if such charge fairly represents the expense of the service rendered it should be allowed, *Mansfield* v. *Humphreys Mfg. Co.* (1910) 82 Oh. 216; see *Appeal of Brumm* (Pa. 1888) 12 Atl. 855; *cf. Royal* v. *Mayor of Cordele* (1909) 132 Ga. 125, and at least one jurisdiction permits a penalty charge for non payment of rent. *Girard Life Ins. Co.* v. *Philadelphia* (1879) 88 Pa. 393; *cf. Bower* v. *United Gas Improvement Co.* (1908) 37 Pa. Super. Ct. 113. Although the franchise of the company in the principal case provided a maximum rate for water rent, it seems reasonable to regard the extra charge as incurred by the consumer's own fault and not as part of the water rent within the meaning of the franchise.

Real Property—Estoppel of Grantee to Deny Grantor's Title.—A granted land to the defendant on the collateral limitation that it be used for railroad purposes, and subsequently A's heirs, alleging a breach, sought to establish their title by virtue of their possibility of reverter. The railroad disproved the breach, set up a title acquired by absolute conveyance from one claiming adversely to A, and sought to have the cloud of A's possibility of reverter removed. *Held,* the railroad is estopped from denying the title of A, its grantor. *Stevens* v. *Galveston, H. & S. A. Ry.* (Tex. 1914) 169 S. W. 644.

The estoppel of a lessee to deny his lessor's title is universally recognized. This estoppel was thought by early writers to be by deed, 10 Viner, Abridgment 460, and sometimes said to arise from subinfeudation, *Merryman* v. *Bourne* (1869) 76 U. S. 592, but it is now generally held to depend on the fact that the lessee has taken possession which he must restore to his lessor, and that it is unjust for him to take advantage of possession so acquired to place upon his lessor the heavy burden of establishing his action to recover the property. See *Tilyou* v. *Reynolds* (1888) 108 N. Y. 558; 2 McAdam, Landlord & Tenant (4th ed.) 1445. Since a grantee in fee simple

absolute holds adversely to his grantor such estoppel manifestly does not apply to him, *Casey's Lessee* v. *Inloes* (Md. 1844) 1 Gill 430, 493; *Sparrow* v. *Kingman* (1848) 1 N. Y. 242; *Patterson* v. *Johnson* (1885) 113 Ill. 559, although a few courts with little or no reasoning have declared such grantee estopped. *Gill* v. *Fauntleroy's Heirs* (Ky. 1847) 8 B. Mon. 177, 184; *Curlee* v. *Smith* (1884) 91 N. C. 172; *Muller* v. *Hoth* (1902) 110 La. 105. But where there is the obligation to restore a possession at some future time the reasons for estopping a lessee would appear to apply with equal force to a grantee, *Blight's Lessee* v. *Rochester* (1822) 20 U. S. 535; *Osterhout* v. *Shoemaker* (N. Y. 1842) 3 Hill 513; *Robertson* v. *Pickrell* (1883) 109 U. S. 608, and therefore, it would seem sound to hold the grantee estopped where, as in the principal case, the grantor retains a possibility of reverter or right of reentry. *O'Brien* v. *Wetherell* (1875) 14 Kan. 616; *Cowell* v. *Springs Co.* (1879) 100 U. S. 55; *Kelso* v. *Stigar* (1892) 75 Md. 376.

Sales—Conditional Sales—Waiver of Reservation of Title by Taking New Security.—The plaintiff took notes for the purchase price of an automobile, reserving title in himself until payment. When the notes matured, he accepted a renewal note with an additional indorser, not expressly continuing the reservation of title. *Held,* the plaintiff's rights under the original conditional contract were not divested by taking the subsequent security. *McDonald Auto Co.* v. *Bicknell* (Tenn. 1914) 167 S. W. 108.

In a contract of conditional sale by which the vendor reserves title until payment of the purchase price, the taking of a note by the vendor for the price or as a renewal of former notes, in the absence of an agreement that it is given in payment or discharge of the pre-existing indebtedness, operates only as an extension of the time of payment, and the vendor is not to be deemed to have waived his reservation of title. *National Cash Register Co.* v. *Riley* (1909) 23 Del. 355; *Beall* v. *Hudson etc. Co.* (1911) 185 Fed. 179. Nor does the sale become absolute where the notes are secured by a mortgage or other collateral security, *Pettyplace* v. *Manufacturing Co.* (1894) 103 Mich. 155; *Monitor Drill Co.* v. *Mercer* (C. C. A. 1908) 163 Fed. 943; *contra, Silver Bow etc. Co.* v. *Lowry* (1887) 6 Mont. 288, nor where, as in the principal case, additional indorsement on renewal notes are obtained. *Laundry* v. *Dole* (1900) 22 Utah 311. In cases where a mortgage has been given by the vendee covering the property which is the subject of the sale, some courts have taken the view that the vendor, by accepting it, necessarily recognizes title in the vendee, and that the sale becomes absolute, notwithstanding the express reservation, *Thornton* v. *Findley* (1911) 97 Ark. 432; see *American Soda Fountain Co.* v. *Blue* (Ala. 1906) 40 So. 218, affd. 150 Ala. 166, but the majority view is that the mortgage is accepted merely as additional security, and that no waiver of the conditional agreement by the vendor is to be implied. *Page* v. *Edwards* (1891) 64 Vt. 124; *Bierce* v. *Hutchins* (1906) 205 U. S. 340; *Champenois* v. *Tinsley* (1907) 90 Miss. 38.

Set-Off and Counterclaim—Payment Under Contract—After Assignment.—In a contract of rescission between D and G, its subcontractor, G transferred its rights to certain forms of D and agreed to pay rent on these forms in the future. D agreed to pay a balance of $20,000 by three promissory notes for $5000 each, the remaining $5000

to be held for one year as security against any liens or claims by the State against G. During the year G assigned his right in the $5000 to the plaintiff. Later, G having failed to pay the rent, the owner of the forms replevied them. The plaintiff sues for the $5000 and D sets off his damage from G's breach of the agreement to pay rent on the forms. *Held,* this set-off should be allowed. *National Nassau Bank of New York* v. *Ludington's Sons Inc.* (N. Y. App. Div. 1914) 149 N. Y. Supp. 967.

Any matter of set-off against an assignee arising from a contract separate from the one on which the plaintiff bases his claim must have been due and payable at the time of the assignment. N. Y. Code Civ. Proc. §§ 501, 502; *Fera* v. *Wickham* (1892) 135 N. Y. 223; *Michigan Savings Bank* v. *Millar* (N. Y. 1906) 110 App. Div. 670; *Callanan* v. *Edwards* (1865) 32 N. Y. 483; Pomeroy, Code Remedies (4th ed.) § 92. But if the cross demands arise from the same contract or transaction the case falls within § 501 of the Code, exclusive of subdivision 2, which provides that such claims may be set-off. The New York courts have somewhat confused this distinction by holding that different parts of a severable contract are to be regarded as separate contracts; *Siebert* v. *Dunn* (N. Y. 1913) 157 App. Div. 387; but in that decision the court was probably influenced by the great length of time over which the contract extended. The $5000 due in the principal case was in fact a balance due under the contract. The beneficial interest under a contract may be assigned and the assignee is entitled to collect the sum due when the assignor has earned it, 15 Columbia Law Rev. 70; *Rodgers* v. *Torrent* (1897) 111 Mich. 680, but the assignor in the principal case had not become entitled to the money, since the defendant's set-off would unquestionably have been good against him. To disallow this set-off against the assignee would be, in effect, to allow the beneficial interest of contracts to be so separated from the obligations thereunder as to force the obligor to pay for something he had not received and might never receive. *Government of New Foundland* v. *New Foundland Ry. Co.* (1888) 13 App. Cas. 199.

Sherman Anti-Trust Act—Commerce with Foreign Nations—Fighting Ships.—The defendants, who operated steamship lines engaged in commerce with foreign nations, combined to divide the traffic so as to allot proportionate shares thereof among formerly competing concerns. They employed only such agents as would sell no passenger tickets other than those of the defendants, and sent out "fighting ships", instituted for the sole purpose of stifling outside competition. In a suit in equity by the United States under the Anti-Trust Act, *held,* the use of "fighting ships" should be enjoined, but a decree of dissolution should not issue. *United States* v. *Hamburgh-American S. S. Line* (D. C. S. D. N. Y. 1914) 216 Fed. 971.

Although most of the decisions under the Sherman Anti-Trust Act have concerned commerce among the States, the provisions of the Statute, in accordance with the constitutional power of Congress, refer specifically to foreign commerce as well, and there is, therefore, no occasion for varying the interpretation of the Act in reference to commerce with foreign nations. *United States* v. *Hamburgh etc. Gesellschaft* (C. C. 1911) 200 Fed. 806; *Thomsen* v. *Union Castle Mail S. S. Co.* (C. C. A. 1908) 166 Fed. 251. The fact that the combination was formed in a foreign country is immaterial, so long as it directly affects the foreign commerce of the United States. See *Thomsen* v. *Union Castle Mail S. S. Co., supra.* A contract for the

use of "fighting ships", whether or not enforcible between the parties at common law, was not illegal so as to give a cause of action to a third party injured by their use. *Mogul S. S. Co.* v. *MacGregor* L. R. [1892] App. Cas. 25. Nevertheless, since the prohibitions of the Sherman Act extend to all agreements unenforcible at common law, *Standard Oil Co.* v. *United States* (1911) 221 U. S. 1; *cf. Atty. Gen.* v. *Adelaide S. S. Co., Ltd.,* L. R. [1913] App. Cas. 781, 801, or even further, see 14 Columbia Law Rev. 659, the injunction restraining the use of "fighting ships" was clearly justified. Since, however, the defendants in the principal case suppressed competition among themselves by means of traffic agreements, *cf. United States* v. *Joint Traffic Assn.* (1898) 171 U. S. 505, and also maintained their combination by employing only such agents as would deal with no other concerns, *cf. Montague* v. *Lowry* (1903) 193 U. S. 38; *Continental etc. Co.* v. *Voight* (1908) 212 U. S. 227, (C. C. A. 1906) 148 Fed. 239, 247, the refusal of the court to issue a decree of dissolution, or to afford some similar adequate remedy, would appear unjustified. See 14 Columbia Law Rev. 659. Benefit to the public by virtue either of a lowering of prices or of more satisfactory service, does not render an agreement any more reasonable, so as to absolve from prosecution a defendant otherwise offending against the provisions of the Act. See *United States* v. *Trans-Missouri Freight Assn.* (1896) 166 U. S. 290; *United States* v. *Chesapeake etc. Co.* (C. C. 1900) 105 Fed. 93, affirmed (C. C. A. 1902) 115 Fed. 610.

Subrogation—Purchaser of Incumbered Estate Assuming the Incumbrance—Effect of Notice—Fraud.—A purchaser from a fraudulent grantor, having constructive though not actual notice that the conveyance to his grantor was in fraud of a judgment creditor having a lien on the land, discharged a first mortgage which he had assumed. *Held,* as against the judgment creditor he was entitled to be subrogated to the lien of the first mortgage. *Tibbetts* v. *Terrill* (Colo. 1914) 140 Pac. 936. See Notes, p. 171.

Torts—Unfair Competition—Copying Articles in Whole or in Part.—The defendant bought toy animals from Bing which were minutely copied from toy animals long manufactured by the plaintiff. *Held,* since the manufacturer of these toys had, on the ground of unfair competition, been restrained from continuing to make them, the court would also restrain their sale by the defendant. *Steiff* v. *Gimbel Bros.* (C. C. A. 1914) 214 Fed. 569.

For one person to make goods in such a way that the average purchaser is deceived into thinking that they are the goods of another is to trespass on the business good will of another by depriving him of a customer's trade to which he has a right, protected by law against unfair competition. See *Coats* v. *Merrick Thread Co.* (1893) 149 U. S. 562; *Reddaway* v. *Banham,* L. R. [1896] App. Cas. 199; *Fox.* v. *Glynn* (1906) 191 Mass. 344. In an action to prevent such interference with his business, the plaintiff must first show that he has established a demand on the part of the public for his goods. See *Rice & Co.* v. *Redlich Mfg. Co.* (C. C. A. 1913) 202 Fed. 155, 156. It must then be proven that the ordinary purchaser has been deceived or that he would be deceived into thinking that the defendant's goods were really of the plaintiff's make. See *Fischer* v. *Blank* (1893) 138 N. Y. 244; *Von Mumm* v. *Frash* (C. C. 1893) 56 Fed. 830; *Hill Bread Co.* v. *Goodrich Baking Co.* (N. J. 1913) 89 Atl. 863. The deceit in these cases may consist in exactly copying the plaintiff's goods, *Dutton* v. *Cupples* (N. Y. 1907) 117 App. Div. 172; *Enterprise*

Mfg. Co. v. *Landers* (C. C. A. 1904) 131 Fed. 240, but this copying may be excused on the grounds that the nature of the article requires the use of a certain form. *Marvel Co.* v. *Pearl* (C. C. A. 1904) 133 Fed. 160; *Diamond Match Co.* v. *Saginaw Match Co.* (C. C. A. 1906) 142 Fed. 727. Again, if the defendant's goods show in the ensemble a strong resemblance to those of the plaintiff, a case of unfair competition is made out. *Victor etc. Co.* v. *Armstrong* (C. C. 1904) 132 Fed. 711; *Fox* v. *Glynn, supra; Fischer* v. *Blank, supra.* And when the defendant copies unessential and non-functional features, courts are particularly ready to restrain such deceit. *Rushmore* v. *Manhattan etc. Works* (C. C. A. 1908) 163 Fed. 939; *Steiff* v. *Bing* (C. C. A. 1913) 206 Fed. 900; *Mueller Mfg. Co.* v. *McDonaly etc. Co.* (C. C. 1908) 164 Fed. 1001. By the weight of authority in this country fraudulent intent must be proved unless such intent must inevitably be inferred from the facts. See *Sampson Cordage Works* v. *Puritan Cordage Mills* (C. C. A. 1914) 211 Fed. 603; *Hill Bread Co.* v. *Goodrich Baking Co., supra; Elgin Watch Co.* v. *Illinois Co.* (1901) 179 U. S. 665. The better view, however, would seem to be that intent is shown if it may reasonably be inferred from the facts, since the general rule that a man must be presumed to intend the natural and probable consequences of his acts applies to unfair competition as well as to other torts. See *Saxlehner* v. *Appolinaris Co.* (1897) 66 L. J. Ch. 533, 538; 16 Harvard Law Rev. 272, 290; *cf. Rushmore* v. *Manhattan etc. Works, supra.*

Transfer Tax—Contingent Interest—Payment of Higher Rate.—A testatrix left her residuary estate in trust to pay the income to her son until he attained the age of 21 years, when he was to receive the principal; but if he died before that age the principal was to go to his issue, who were subject to a tax of one per cent, and in default of issue, to persons taxable at the five per cent rate. *Held,* under §§ 222, 230 of the New York Tax Law, the property should be taxed at the five per cent rate. *In re Zborowski's Estate* (N. Y. 1914) 107 N. E. 44.

As to the constitutionality of the statute and the discussion of the question whether the tax is one on property or on the right to inherit, see 3 Columbia Law Rev. 64. It was contended that the change in the definition of the words "estate" and "property", to mean the interest passing to the heirs or legatees instead of the interest of the testator as theretofore was the case, rendered the section relating to the payment of the tax at the higher rate inapplicable. But the court dismissed the argument by reviewing the history of the amendment, and concluded that it was not intended to effect any change in the law as it had previously been interpreted.

Waters and Water Courses—Appropriation of Water—Irrigation Companies.—The defendant irrigation company lessened the amount of water which the plaintiff, an annual purchaser, was accustomed to receive. *Held,* the plaintiff was an appropriator, and as such, is entitled to an injunction. *Prosole et al.* v. *Steamboat Canal Co.* (Nev. 1914) 140 Pac. 720.

An appropriation of water consists not merely in its diversion, but also in its application for beneficial purposes. *Morris* v. *Bean* (C. C. 1906) 146 Fed. 423, 426; *Hague* v. *Nephi Irrigation Co.* (1898) 16 Utah 421, 429. When, therefore, water is supplied by an irrigation company to a person who consumes it upon his land, the latter is

generally regarded as the appropriator, and the company is said to make the diversion as his agent. *Wyatt* v. *Larimer etc. Co.* (1893) 18 Colo. 298; *The Albuquerque etc. Co.* v. *Gutierrez* (1900) 10 N. M. 177; see *Slosser* v. *Salt River etc. Co.* (1901) 7 Ariz. 376. In other jurisdictions, notably Idaho, the irrigation company is regarded as the appropriator and the consumer is treated as the agent of the company for the purpose of establishing a beneficial use of the water. 3 Kinney, Irrigation & Water Rights (2nd ed.) § 1477. But even under this rule, by statutory interpretation, the consumer's right to use the water has been held to be perpetual, subject to be defeated only upon default in payment or failure to comply with lawful requirements. *Farmers' etc. Co.* v. *Riverside Irrigation Co.* (1908) 14 Idaho 450, and the customers of an irrigation company are preferred in the order of their priority of user. See *Niday* v. *Barker* (1909) 16 Idaho 73. If, however, an irrigation company is regarded as a public service corporation, the rights of the consumer cannot be worked out on any theory of agency; and any preferences by contract or because of priority must be declared void as unjust discrimination. See *Leavitt* v. *Lassen Irrigation Co.* (1909) 157 Cal. 82; see 10 Columbia Law Rev. 506. The effect, however, in the majority of jurisdictions, whether by statutory interpretation or otherwise, is the same as in the principal case, and establishes the ultimate right to the water in the consumer. 2 Wiel, Water Rights in the Western States (3rd ed.) § 1338.

Witnesses—Privileged Communications—Waiver.—In an action for personal injuries, the plaintiff testified as to the nature and extent of the injuries, the physician's treatment, and his conversation with him. *Held,* he thereby waived his privilege under § 834 of the Code of Civil Procedure, and the physician's testimony should have been admitted. *McKenney* v. *American Locomotive Co.* (N. Y. 1914) 149 N. Y. Supp. 826.

The purpose of § 834 of the Code is "to enable the patient to disclose to his physician, without danger of exposure, all information necessary for his treatment". See *Edington* v. *Aetna Life Ins. Co.* (1879) 77 N. Y. 563, 571. Since such statutes confer merely a personal privilege, the patient may waive his rights. *Keller* v. *Home Life Ins. Co.* (1902) 95 Mo. App. 627. It would seem that where the patient voluntarily testifies to his physical condition, he has shown his willingness to make the matter public, and so to waive the secrecy imposed by the statute; and to allow him, in such a case, to exclude the unbiased and reliable testimony of the physician, when such exclusion can serve no useful purpose, is most inequitable. 4 Wigmore, Evidence, § 2389. The courts, however, generally refuse to regard such testimony as a waiver, except when suit is brought against the physician for malpractice. *Warsaw* v. *Fisher* (1899) 24 Ind. App. 46; *Lane* v. *Boicourt* (1891) 128 Ind. 420. It is said that by testifying merely to his physical condition he has not "opened the door of the consultation room". *Fox* v. *Union Turnpike Co.* (N. Y. 1901) 59 App. Div. 363; *May* v. *Northern Pac. Ry.* (1905) 32 Mont. 522. The courts have recognized, however, that if in addition to this the patient testifies to the physician's treatment, and their conversation, or permits his physician to do so, so little of secrecy remains that the privilege conferred must be regarded as waived. *Rauh* v. *Deutscher Verein* (N. Y. 1898) 29 App. Div. 483; *Holloway* v. *Kansas City* (1904) 184 Mo. 19; *Patnode* v. *Foote* (N. Y. 1912) 153 App. Div. 494; but see *Warsaw* v. *Fisher, supra.*

BOOK REVIEWS.

EUGENE UNTERMYER, *Editor-in-Charge.*

COMMENTARIES ON THE LAW OF EVIDENCE IN CIVIL CASES. By BURR W. JONES. Rewritten and enlarged by L. Horwitz. San Francisco: BANCROFT-WHITNEY CO. 1913. pp. Vol. I, xxxvi, 1031; Vol. II, x, 1071; Vol. III, x, 1036; Vol. IV, ix, 976; Vol. V, vi, 1157.

This work, by Prof. Burr W. Jones of the University of Wisconsin, is an enlargement of Jones on Evidence, a book which had previously been through three editions. The present edition takes a place as one of the long works on the law of evidence.

The purpose of the reviser is thus stated in his preface: "Herein will be found no extravagant titles—no flights of forensic diction—no newly-raised hair-splitting contests, but an honest effort to set out the law of to-day, so that the intelligent reader may understand it, and verify each proposition by its accompanying citation."

In so far as the author has attempted to state the law of evidence simply and without any fire-new terminology, his efforts is to be commended, and it must be admitted that in general the language of the text is simple and the terms used are those to which the profession is accustomed. He has not endeavored to be original merely through being different from others—an error from which recent authors of note on the law of evidence have not been altogether free.

In the endeavor to set out the law "so that the intelligent reader may understand it," the book is not always all that might be desired. The work gives evidence of great industry in collecting material, but the material is sometimes not well selected, correlated, or criticised. For instance, (Vol. II, p. 3) there is a long extract from the case of *Gunn* v. *Dolan* which the author calls an "interesting description of the burden of proof," which seems on the contrary neither interesting nor valuable. Again, (Vol. II, p. 4) where Stephen's definition of the burden of proof is quoted: "The burden of proof in any proceeding lies at first on that party against whom the judgment of the court would be given, if no evidence at all were produced on either side, regard being had to any presumption which may appear upon the pleadings. As the proceedings go on the burden of proof may be shifted from the party on whom it rested at first by his proving facts which raise a presumption in his favor." Concerning this definition the author merely says: "This rule has been generally approved in this country." Here no comment is made on the failure of Stephen to distinguish clearly between the burden of establishing a proposition and the burden of going forward with evidence—a radical defect in this definition; and this, too, though the fact that there is a confusion in legal usage between these two meanings of the term burden of proof is recognized by the author on the very next page of the book. (Vol. II, p. 5.) Still later, (Vol. II, p. 6) a well known extract is given from the opinion of Lord Justice Bowen in the case of *Abrath* v. *The Northeastern Ry.* (1883) L. R. 11 Q. B. D. 440, (the quotation marks being unfortunately omitted, though the citation of the case is referred to in the foot-note). In this passage, Lord Bowen uses the term burden of proof in the sense of burden of going forward with evidence, but this fact is not clearly pointed out by the author who

merely adds these words to Lord Bowen's statement: "That being so, the question as to the onus of proof is only a rule for deciding on whom the obligation rests of going further if he wishes to win." This is true, but only in one of the meanings of the term burden of proof, and this fact should have been more clearly indicated at this point, and not left merely to inference from what the author has stated before.

In treating the best evidence rule, the author (Vol. II, p. 167) quotes with seeming approval the language of Prof. Thayer, that the term best evidence "would probably have dropped naturally out of use long ago, if it had not come to be a convenient short description of the rule as to proving the contents of a writing. Regarded as a general rule, the trouble is that it is not true to the facts, and does not hold out in its application." Yet, a few lines further on (Vol. II, p. 168) the author says: "The rule is elementary which requires the production of the best evidence of which the case, in its nature, is susceptible. The rule does not demand the greatest amount of evidence which can be given on the litigated fact, but its design is to prevent the introduction of any, where from the nature of the case, the law presumes, or the proof shows that better evidence is in the possession or under the control of the party." This is certainly too broad a statement of the rule as enforced to-day, and yet the author makes it in the face of the very accurate statement of Prof. Thayer which the author himself has just quoted without dissent.

Concerning the pedigree exception to the hearsay rule (Vol. II, p. 709) we find the following: "The declarations of the deceased parents as to the legitimacy or illegitimacy of their own children are admissible." This view is set forth more fully in the foot-note on the same page. The author here fails to see the difference between using these hearsay statements to prove illegitimacy *per se* (as in the case of *Crispin* v. *Doglioni* (1863) 3 Swab. & T. 44) and using them to negative a claim of legitimacy. He does not seem fully to have grasped the principle that there is no question of pedigree except in cases where there is a claim of legitimate relationship.

The treatment of the admissibility of hearsay declarations as part of the *res gestae* leaves much to be desired. Thus (Vol. II, p. 809) it is said concerning the things admissible as part of the *res gestae*: "Their sole distinguishing feature is that they should be the necessary incidents of the litigated act * * *. In other words, they must stand in immediate causal relation to the act." Now in reality in case of declarations admitted as part of the *res gesta,* it is the act which the declaration accompanies which stands in the causal relation to the declaration, not the declaration which stands in causal relation to the act. The act is the *res gesta,* and the declaration goes in because it is brought forth by and spontaneously accompanies the *res gesta.* The author also quotes with apparent approval one of the most confusing and erroneous statements of the doctrine of the *res gesta* in our law—that made by Mr. Justice Swayne in Travelers' Insurance Co. *v.* Mosely (1869) 8 Wall. 397, which lays it down that the declarations accompanying the principal fact are the *res gestae,* thus reversing the sound conception of the whole doctrine of the *res gesta* exception to the hearsay rule, which is that of some hearsay statement which is admitted in evidence because it accompanies and qualifies or explains some other fact (*res gesta*) which is of itself admissible in the case.

There is no branch of the law of evidence where mere uncritical quotation is more dangerous than in the subject of the *res gesta,* and the author seems to have fallen into this error here.

The book is printed on India paper, and is much more convenient to handle than any law book of its length that we have seen. It is in general free from misprints and small errors. One misstatement, however, is made, (Vol. I, p. 11) in crediting the well-known quotation on hearsay from the *Berkeley Peerage Case* to Lord Mansfield instead of to Chief Justice (Sir James) Mansfield, who wrote the opinion in the case.

The book is particularly full in its citation of California authorities, a fact which should make it useful to the bar of that State.

In regard to the book's style, the author in his preface says: "Here will be found no flights of forensic diction." In general this is true; still, (Vol. I, p. 13) we find the following: "Given then this original state of things, the apparent transition from the crude and aboriginal views of what might be offered before the tribunal, to the present elaborately indexed guide to what is and what is not evidence is in reality the evolution which growth and interchange of ideas of commerce, and of education, has fortunately and relentlessly demanded." Again referring to Prof. Thayer, who is rightly given by the author a very high place among the writers on evidence, it is said (p. 660): "Thayer, who seems of all the writers on evidence to have not only acquired a giant grasp of his subject, but to have combined it with a Byronic facility of diction, and clarity of expression." In a few passages like the foregoing, the wings of the author's diction seem to have gotten a little beyond control.

As a whole, the book is somewhat inferior to either Wigmore or Chamberlayne as a treatise on evidence. Nevertheless, it has merits of its own, the chief one being the industry which has brought together so much excellent material bearing on the subject.

Ralph W. Gifford.

CHAPTERS ON THE LAW RELATING TO THE COLONIES. By SIR CHARLES JAMES TARRING, KNT., sometime Judge of H. B. M. Supreme Consular Court, Constantinople, and H. M.'s Consul, late Chief Justice of Grenada, West Indies. Fourth Edition. London: STEVENS & HAYNES. 1913. pp. xxii, 398.

Our early origin as British colonies and plantations would be sufficient excuse for an interest in a work on the law relating to the British colonies, and this interest has certainly been heightened by our own experience in colonization during the past sixteen years.

The principal divisions of the present work are as follows:

1: The laws to which the different classes of colonies are subject;

2: The executive;

3: The legislative power;

4: The judiciary and the Bar;

5: Appeals from the colonies;

6: Imperial statutes in force relating to the colonies.

Save for the first part, that is, the laws to which the colonies are subject the book would only be of interest either to Britishers or as

a book of reference to historical students in this country. The first part, however, must be of interest to all students of legal problems dealing with the insular possessions of the United States. The English decisions as to the laws which shall be applied to the different colonies would of course have a remote bearing with us but as analogies they might be in certain cases very useful.

The author sub-divides the first part with reference to colonies formed by the settlement of unoccupied or barbarous countries and to those formed by conquest or cession from other nations. In a general way, in the case of colonies formed by settlement of unoccupied or barbarous country, the law of England will be applied as it was at the time of first occupation, though in many cases, by special acts of Parliament, it was decreed that the laws of England as of a specific date should be applied. Most of the acts of this nature, however, have a saving clause which will admit of many exceptions, as for example,—that the law of England will apply *when suitable to the circumstances and population of the particular colony in question,* and, as was pointed out in the famous English case of *Whicker* v. *Hume,* (1858) 7 H. L. *124, *161.

"It is a very difficult thing to decide what laws are adapted "to the situation in the colony."

It is not surprising, therefore, that the list of statutes which have been held not to apply to certain colonies is quite formidable.

As to conquered or ceded colonies the general rule is that the laws of the countries shall remain in force until altered by the conquering nation.

In this first part of the work a number of exceedingly interesting cases are discussed in detail. Many of these cases, as on the question of the territorial rather than the personal application of laws, the status of a person domiciled in the different colonies, the validity of marriages when not conforming to the *lex loci,* would be of practical use in the case of a similar question arising in our insular possessions.

In discussing the generally recognized principle of English law that British subjects cannot take possession in their own right of a foreign country and that no British subject can attain the position of independent ruler, the famous case of Sir James Brooke and the sway exercised by him over the territory of Sarawak, in Borneo, is examined in some detail. In spite of the legal principles to the contrary, Sir James Brooke, acting under a grant from the Sultan of Borneo, which gave him the right of government over Sarawak, with the power to nominate his successor, was eventually recognized by the British government. In 1864 a British Consul was appointed of Sarawak and obtained his *exequatur* through the instrumentality of Sir James Brooke, the then ruler over that territory.

The remaining chapters of the work, of the executive, legislative power, judiciary and bar, as well as the appeals from the colonies, are very complete and supported by voluminous citations.

The work also contains a topical index of cases on appeal decided in the Privy Council, which is most comprehensive though of little value to American students. On the whole this work would be a useful addition to any important law library.

Paul Fuller, Jr.

COMPILED STATUTES OF THE UNITED STATES. Embracing the Statutes of the United States of a General and Permanent Nature in Force, Dec. 31, 1913. Compiled by JOHN A. MALLORY. St. Paul: WEST PUBLISHING CO. 1914. pp. Vol. I, ciii, 1190; Vol. II, vii, 1191-2320; Vol. III, v, 2321-3613; Vol. IV, ix, 3614-4863; Vol. V, iii, 4867-5686.

The bench and bar have long felt the necessity for a systematic edition of United States Statutes. Since the Revised Statutes of 1878, the first compilation was published in 1901, followed by biennial cumulative supplements, the last of which was published in 1911, and made a single volume of considerable bulk. The vast amount of federal legislation in recent times has rendered it expedient and even urgent that some one cast these many enactments into systematic form, and the editorial staff of the West Publishing Co., under the able tutelage of Mr. John A. Mallory, has come up fully to the requirements of the situation. Mr. Mallory edited the compilation of 1901, having first assisted in the preparation of the Revised Statutes of 1878, and he has accordingly well established his fitness to guide the course of the present undertaking.

In commenting upon this work, it is well to begin with those features which enable the practitioner to find what he wants without the necessity of a disagreeably lengthy search. The index certainly appears exhaustive, and, as the publishers assert, has been arranged by a number of eminent experts in statute indexing. There are a great number of topical heads, which do their best to mitigate the effects of Congress's tendency to indulge in lavish statute-making. The table of Acts from 1789 to date, set forth by their popular names, will be of great value as a short cut to the lawyer who has studied American legal history, or to him who reads his newspaper conscientiously. The index volume also contains a "Table of Revised Statutes Sections, showing amendments and repeals, with references to the sections of the Compiled Statutes where they are found, a Chronological Table of Laws, showing all acts included in the compilation, with references to Compiled Statutes sections, and a Table of Acts Repealed or Superseded, chronologically arranged, with references to explanatory and historical notes."

With these efficient instrumentalities for finding the desired statute, let us examine the nature of the material found in the first four volumes when the investigator has once ascertained what he wishes to find. The first features which strike the attention of the reviewer are the explanatory notes which follow the different sections, whenever any change has been made by reason of omission, addition, or modification. To illustrate the nature of these notes, an excerpt is here given, taken at random from Vol. 2 at page 1738:

"§ 4291. (Act May 6, 1882, c. 126, § 2, as amended, Act July 5, 1884, c. 220.) **Masters of vessels landing Chinese laborers, punishable.**

The master of any vessel who shall knowingly bring within the United States on such vessel, and land, or attempt to land, or permit to be landed any Chinese laborer, from any foreign port or place, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not more than five hundred dollars for each and every such Chinese laborer so brought, and may also be imprisoned for a term not exceeding one year. (22 Stat. 59. 23 Stat. 115.)

See notes to § 1 of this act, ante, § 4290.

This section was amended by inserting, after the words "and land", the words "or attempt to land", as set forth here, by Act July 5, 1884, c. 220, cited above.

This application of the provisions of this section was extended by Act Oct. 1, 1888, c. 1064, § 3, post, § 4305.

Provisions somewhat similar to those of this section were made by Act Sept. 13, 1888, c. 1015, § 9, post, §4310."

It may be noted that the section numbers are different from those employed in the Revised Statutes, which has been necessitated by the volume of legislation since 1878. Where, however, the particular enactment was contained in the Revised Statutes, the original section number has been indicated in parenthesis, following the particular section number in the Compiled Statutes.

In view of the vacillating state of mind which has often characterized the proceedings in our federal legislature, it is frequently difficult to ascertain the exact course of statutory repeal or modification, and accordingly the historical notes to which we have already adverted, should be of considerable value in arriving at the exact state of our written law, and in estimating the importance to be ascribed to a decision interpreting the terms of a particular enactment. The repeal of a statute is always indicated and is followed by such historical notes as are demanded from the nature of the enactment. The same is true of such laws as have been superseded.

The volumes proper are bound in the serviceable yellow buckram which has characterized the output of the publishers, and indicate on their exteriors, the titles, pages, and section numbers included in the particular volume. The work contains a great mass of matter within a comparatively small compass, and should be of great value to the judge or lawyer throughout the entire country.

Books Received.

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Legal Principles of Public Health Administration. By Henry Bixby Hemmingway. Chicago: T. H. Flood & Co. 1914. pp. xxxvi. 859.

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Das Seekriegsbrecht. By Gerichsassessor Dr. Hans Wehberg. Stuttgart: W. Kohlhammer. 1915. pp. xi, 456.

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CONTRIBUTIONS AND REQUISITIONS IN WAR.

The interest of the world in the right of a belligerent occupying territory of the enemy to exact contributions, requisitions and ransom has been greatly stimulated by the practice of German commanders in the present war, requiring payments from the cities occupied, notably and on a great scale in case of the cities of Brussels and Antwerp, but in many other cases as well.

I quote, from dispatches published in the newspapers of December 1, 1914:[1]

"Amsterdam, Nov. 30.—A message from Brussels to the *Handlesblad* states that the German governor of the province of Brabant, in which Brussels is located, convoked a meeting of the financiers, and told them that Belgium must pay 35,000,000 francs ($7,000,000.) monthly for the maintenance of the German troops.

"In addition to this sum, it is said, Belgium must contribute a war levy of 375,000,000 francs ($75,000,000.) as a penalty for violations of neutrality by Belgium and losses ensuing therefrom to Germany."

I do not venture to affirm details or discuss them in dependence on the press. The fact, however, can not be doubted that heavy contributions and requisitions are being required of Belgian communities.

The interest of our own people has been further aroused by the statement of Mr. Roosevelt that he has seen the plans of two foreign nations for seizing, in case of war, our principal seaport cities and holding them for ransom.

It seems therefore of present interest to discuss the following questions:

1. Are such demands for contributions allowed by the law of civilized warfare?

[1]See Washington *Post* of Dec. 1, 1914.

2. If allowed, how, if at all, is the right regulated or limited?

3. How may the demands be enforced?

We must remember that law is, generally, an historical development and survival; that this is as true of the law of war as it is of the law of peace. If we find the rules of war severe, we must remember that the modern rules are often modifications of others, far more harsh, which were their predecessors, and that the substitution was approved because a simple repeal of the law was not possible. The process of humanization must go on, however, and there must be no limit to it, except that it must always be practicable and such as can be enforced and will be adhered to under the stress of actual war. These conditions are imperative.

The selling of prisoners of war into slavery replaced the earlier practice of putting them to death, often with torture.

As Grotius says, the laws of slavery "are introduced by the Laws of Nations for no other cause than this; that the captors, induced by so many advantages, may willingly abstain from the extreme rigour by which they were allowed to put captives to death, either immediately or after any delay, as we have said. They are called *servi,* says Pomponius, because conquerors commonly sell them, and so preserve them from being killed."[2]

When a city had resisted and was taken, the rule of the Old Testament was not lenient. Here it is: "When the Lord thy God hath delivered it into thine hands, thou shalt smite every male thereof with the edge of the sword; but the women and the little ones and the cattle and all that is in the city, even all the spoil thereof, shalt thou take unto thyself; and thou shalt eat the spoil of thine enemies which the Lord thy God hath given thee."[3]

The slaughter of the inhabitants of towns taken by assault and the appropriation and destruction of their property and the selling of prisoners of war into slavery were common in the best periods of Greece and Rome.[4] The Christian Church sought to mitigate these practices which yet continued in the Middle Ages.[5]

But the enslaving of prisoners of war gradually died out, and had disappeared when Grotius wrote, in 1625. Ransom took the

[2]Grotius, *De Jure Belli et Pacis* (Whewell's translation) Vol. 3, 151.

[3]Deuteronomy, Ch. 20, verses, 13 & 14, quoted in Stockton, Outlines of International Law, 23.

[4]Bordwell, Law of War, 8; Grotius, *De Jure Belli et Pacis,* Book III, c. XII, (Whewell's translation) Vol. 3, 230-231.

[5]3 Phillimore, International Law, 142; Bordwell, Law of War, 22.

place of sale, and those not ransomed were often miserably put to death. Thus the English taken at Pontoise in 1441 were chained by their necks like dogs, and those who could not pay were thrown into the Seine.[6]

As is well known, Grotius' treatise on *"The Law of Peace and War"*, published in 1625, produced a profound effect. It was an age of progress, and Grotius had a large mind, great learning and a humane heart. He established permanently certain natural laws, founded on reason and humanity, as controlling even in war. Necessity alone was permitted to override them.[7]

Gustavus Adolphus, the great military character of this age, became the ardent disciple of Grotius and was never without a copy of his great work, which has not ceased, in nearly three centuries of existence, to command the respect and veneration of mankind. Yet, six years after its publication, Magdeburg was stormed, burned, and put to sack with every conceivable horror by Tilly, when 30,000 out of 36,000 inhabitants were butchered without regard to sex or age.

Gustavus Adolphus, during this Thirty Years War, had ransomed towns from pillage; and the great commanders of Louis XIV followed him as their master and exemplar.[8] As Bordwell points out, "One of the greatest advances ever made in the conduct of warfare was the substitution, during this period, of contribution for pillage."

Marshal Saxe describes his systematic method, saying: "An experienced general, so far from maintaining the troops under his command at the expense of their sovereign, will, by raising contributions, secure their subsistence for the ensuing campaign, so that well lodged, clothed and supported, they will consequently be easy, content and happy." He advised that circular letters be sent to various places, threatening the inhabitants with military execution if they refuse the demands made on them, "which ought at the same time, to be moderate and proportionable to their several abilities." Parties of twenty-five to thirty men with officers are to be allotted certain villages, ordered to march by night, and not to plunder or commit any outrages on pain of death. On arriving in the neighborhood of their destination, they should send an officer and two men to the chief magistrate to know if he will

[6]Bordwell, Law of War, 19-20.
[7]Bordwell, Law of War, c. III.
[8]Bordwell, Law of War, 42; Hall, International Law (6th ed.) 420.

furnish the supplies and take an acquittance under the seal of the commander-in-chief. If he will not, the force burns some detached houses and marches away, threatening to return and burn the whole village. The parties meet at a rendezvous, all guilty of rapine are hanged, and those who have done well are rewarded.

Marshal Saxe estimates that twenty parties, despatched monthly, will be adequate and more effective than large bodies; and he adds, "nothing can be more entertaining than these incursions and the soldiers themselves will certainly take pleasure in them."[9]

In earlier times, as in the Thirty Years War, where armies were collected from adventurers of all nations and were not paid, but "lived by requisitions, made food and winter quarters the object of the campaign," plunder and brutality were inevitable.[10] In the War of the Succession, Marlborough and Villars introduced better methods. By understandings between the commanders, they levied only on the territory they occupied, and limited the amount to that determined by commissioners of the hostile parties. "Villars declares his satisfaction," says Woolsey, "at having fed an army of two hundred battalions and of more than three hundred squadrons of cavalry for three months on a space near the Rhine of a hundred square leagues without forcing a peasant to quit his dwelling."[11]

Let this be recorded to the lasting glory of that great commander, not less to be remembered than his brilliant victories at Denain or Landrecies.

"In the war of the Revolution, England declared it to be a right in war (1) to demand provisions and raise contributions, which might be enforced, if necessary, by the sword; (2) to ravage a territory where you have no other way of bringing an enemy to an engagement or to terms." But it is believed "the right to ravage has not been asserted or acted upon since, unless in a few cases which were pretended to be extreme."[12]

Enlightened selfishness and humanity generally dictate the same course of conduct. So, as Professor Bordwell points out, "The respect with which private property on land is regarded to-day is largely due to the change from pillage to the system of contribu-

[9]Marshal Saxe's Memoirs upon the Art of War, 94-97, quoted at length in Bordwell, Law of War, 43-45.

[10]Woolsey, International Law (6th ed.) 218.

[11]See Woolsey, *loc. cit.*

[12]See Woolsey, *loc. cit.*

tions, a change that was induced by the greater efficiency of the latter; and many other instances could be cited of ameliorations, which have been brought about by the selfish interests of belligerents."[13]

"The custom has since hardened into a definite usage," says Hall.[14]

Vattel points out that a nation taking up arms in a just cause has a double right, namely, to get back her property, withheld by the enemy, and, in addition, to exact "the charges of the war and the reparation of damages."[15]

Bluntschli declares that the army which occupies the territory of the enemy has the right to exact that the inhabitants contribute gratuitously to the entertainment and transport of the troops and material of war.

Calvo,[16] in his great work, which is such a mine of precedent, shows (to freely translate and condense his statement) that when an army invades a country it must subsist, and the law of necessity permits the imposition of contributions or requisitions, in kind or in cash, and the application to the maintenance of the troops of a portion of the usufruct of the lands whose free enjoyment and exploitation are left to the inhabitants. Anciently, he says, it was the usage to crush with imposts the people invaded; that some writers justify this as accomplishing the object which belligerents ought to entertain, namely the weakening of the enemy. But this theory is in flagrant contradiction to the principle which establishes that war is directed solely against the state and not against the subjects taken separately. Just as the enemy has not the right to force these last to enter its service, so it can not compel them to furnish the money necessary to continue the war. Experience elsewhere, he says, has demonstrated that this abuse of force serves only to exasperate the population and to envenom the wars. Moreover, the changes and progress in the administration of armies have, little by little, caused the system of military contributions to fall into desuetude, and strengthened the sentiment of respect for private property, so that, in our day, (this was published in 1896) when an army is constrained to have recourse to coercive measures

[13]Bordwell, Law of War, 1.

[14]Hall, International Law (6th ed.) 420.

[15]Vattel, Law of Nations, c. IX, 364; Bluntschli, *Droit International*, (Lardy's translation) 368, *et seq.*

[16]Calvo, *Le Droit International Théorique et Pratique*. Vol. IV, §§ 2231-2244.

to procure what it needs, an indemnity is paid to the despoiled owners. He points out that Bismarck himself recognized the strength of this principle, when in the negotiations preceding the convention of Frankfort, the German plenipotentiaries peremptorily refused to consider acts anterior to March 3, 1871, saying that Bismarck had remitted one billion from the sum of six billions of francs at first demanded from France and, by the concession, had freed himself from all claims for occupation of the invaded territory.

Napoleon, who fully adopted and practised the rule that "war should pay for war," records in his memoirs that the excesses committed under this head, in the war against Spain, contributed not a little to the reverses which he experienced in the Peninsula.[17] He constantly exacted ransoms, both in cash and in kind. For instance, for suspense of operations at Plaisence, in May 1796, the Duke of Parma was held to pay a contribution of two million livres, and to furnish 700 horses, a certain quantity of forage and provisions, and twenty pictures at the choice of the commanding general. Halleck[18] shows that after Jena Napoleon caused Prussia to pay upwards of 100,000,000 francs; and that he forced Valencia in 1812 to pay 50,000 francs, together with an additional 200,000,000 francs for the use of the army. By the Treaty of 1815, however, France was compelled by the allies to pay 700,000,000 francs in return.[19]

Wellington seems to have thought of requisitions as iniquitous, and he abstained from them, both when he was among friends, as in Spain, and among enemies, as in France; and, when the Ministry urged them upon him, he opposed the system "as needing terror and the bayonet to carry it out, *as one for which the British soldier was unfit, and as likely to injure those who resorted to it.*"[20]

This is a statement which does honor to the great Duke and the men he led to victory.

After Waterloo the allied army received provisions and forage on requisitions. Receipts were given for all goods taken, not with a view to paying for them, but to avoid abuse and plunder, and restrict the taking to food and forage.[21]

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[17]Calvo, Vol. IV, §§ 2232-2255. Beginning at the latter section Calvo enumerates many such exactions, devoting three and a half pages to examples thereof.

[18]Halleck, International Law (4th ed.) Vol. II, 86, note.

[19]Calvo, Vol. IV, § 2271.

[20]Woolsey, International Law (6th ed.) 219.

[21]Halleck, International Law (4th ed.) Vol. II, 86; Wellington's Dispatches, 1815.

Austria, in 1847, imposed on the King of Sardinia a contribution of 65,000,000 francs; England adopted a like practice with the Chinese. Again, in our Mexican War, Secretary of War Marcy maintained the right of a combatant to live on the country occupied and to make the whole burden of the war weigh on the enemy; but General Scott, more prudent, paid for any supplies that he needed and took by force only on rare occasions when it was not possible to do otherwise.[22]

In 1856, at the close of the Crimean War, no pecuniary reclamation was allowed against any nation, and it was erroneously hoped that the practice had been abandoned.[23]

Instances of exactions recur in the wars of France against Cochin-China in 1862, and the United States, Great Britain, France and The Netherlands against Japan in 1864.[24]

As to the practice in our Civil War, the books are singularly reticent. Much freedom in foraging and living off the country seems to have been tolerated, but no system of regular requisitions or contributions seems to have been employed. Receipts, I am told by an army officer of the highest rank, were given, and later many of these were redeemed by payment, but many were lost.[25]

Calvo expresses the opinion that Prussia is, without contradiction, the most excessive of states in her pecuniary demands.[26] She exacted 100,000,000 thalers from the several states in her Austrian war, and from France, in 1871, 5,000,000,000 francs, besides two provinces. These conditions, he says, were far more onerous than those imposed by the allies in 1815.

In 1878 Russia exacted from Turkey 802,500,000 francs.[27] A note to the last citation, written in 1896, shows a total of war indemnities since 1795, independent of exacations in kind (*en nature*), equal to 7,235,000,000 francs, of which Prussia's part was 5,225,000,000 francs, that of France was 875,200,000 francs, and all other nations 1,135,000,000 francs.

The books discuss, in connection with contributions and requisitions, these indemnities and exactions required as a condition of the treaty of peace at the conclusion of the war. These, however, should not be confused with the exactions from territory un-

[22]Calvo, Vol. IV, § 2233; Halleck, International Law (4th ed.) Vol. II, 86; Hall, International Law, 424.

[23]Calvo, Vol. IV, § 2278.

[24]Calvo, Vol. IV, §§ 2274-2275.

[25]See, as to General Sherman's practice, Halleck, International Law, (4th ed.) Vol. II, 83, note.

[26]Calvo, Vol. IV, §§ 2279-2280.

[27]Calvo, Vol. IV, § 2281.

der military occupation, which are more particularly the matter in question here. The terms of peace on which the victor surrenders his conquest may be whatever the parties see fit to stipulate.

Calvo makes a distinction, which publicists sometimes neglect, between contributions and requisitions,[28] quoting Garden to the effect that contributions of war have been substituted for pillage. They may be in money or in kind, and are usually exacted under penalty of military execution. The payment of these contributions, he asserts, ought to assure the conservation of property of all kinds, but, in practice, it does not free the inhabitants from requisitions by the conquerors. By requisition is understood the demand of detailed objects, in the form of an invitation, but pursued with force if it becomes necessary. This mode of service and the expression which designates it, he says, was invented by Washington in the American War.

Calvo contends that, as pillage and devastation are no longer considered as rights of war but are now reproved by the general practice of nations, the imposition of contributions has no more a *raison d'être*. He says that Bluntschli blamed the Prussians, in their war with Austria and other German states, in 1866, for levying, without sufficient excuse, money contributions on several cities which they occupied: *"L'Europe actuelle, dit il, n' admet plus cette façon d' agir, reste des temps barbares."*

He shows[29] that in the invasion of France, in 1870, the German commanders proclaimed the communes liable for acts of hostility by civilians, as injuries to telegraph lines, railroads, bridges or canals. They imposed heavy contributions to be paid and threatened burning in case of non-payment. Furthermore, enormous contributions were imposed on territories for acts to which they were wholly foreign. So the *Departments de l'Aisne, des Ardennes* and *de l'Aube* were held for contributions of three million of francs as an indemnity to owners of foreign ships, and to Germans who had been expelled from France; and the *Departments de Seine et Marne*, of *La Meuthe* and *La Meuse*, had especially imposed on them, for the profit of the same ship owners, the sum of 2,755,253 francs.

Calvo admits, with most authors, that the army which occupies enemy's territory may exact from the communes or inhabi-

[28]Calvo, Vol. IV, § 2235.

[29]Calvo, Vol. IV, § 2236.

tants what is necessary for its support and movements, but maintains that requisitions ought to be limited to things absolutely indispensable. He says that it was so understood by Washington, to whom has been attributed the first application of the system. Washington had recourse to it only in cases of urgent necessity. He then demanded, under the form of an invitation, those things of which his army had need from those who possessed them. If they were refused he employed force. He operated in countries poor and almost deserted, and he regarded it as his first duty not to let his soldiers die of hunger. Therefore his requisitions were addressed as well to friends as to enemies.

The statement constantly made and quoted from Calvo, apparently in sole reliance on Garden, that Washington invented the term "requisition" and the practice as well, seems unwarranted. That the practice antedated him by generations is fully shown by many instances already mentioned; and Hall,[30] admitting that he may possibly have first used the term, shows, in a long note, the frequent employment of this method in earlier times.[31]

Calvo says[32] all writers agree in recognizing that the right of requisitioning ought to be exercised with moderation, and proportionately to the resources of the country occupied; and the great part are of the opinion that the delivery of the objects required, even when constrained, ought not to be made except on payment in money or in requisition bonds. He quotes at some length, in support of this view, from Garden, Massé, Heffter, the Instructions for the Armies of the United States, and Bluntschli. He gives a discussion of the Conference of Brussels of 1874, and the rules adopted, in accord with the opinions above, limiting demands "to necessities of war", and providing that receipts shall be given and that only the commandant in the locality occupied can make a requisition.

It appears[33] that the German army in France, in 1870-1871, frequently made exorbitant requisitions beyond the resources of the municipal treasury; moreover, the communities contributing were often not exempted from any of the charges of war but were none the less compelled to lodge officers and soldiers in their private homes and to deliver regularly food, clothing, munitions, etc.

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[30]Hall, International Law (6th ed.) 427-428.

[31]See also Bordwell, Law of War, 46.

[32]Calvo, Vol. IV, § 2238.

[33]Calvo, Vol. IV, § 2254.

By the official report of the National Assembly of France it appears, for instance, that in the Departments invaded the contributions for the war amounted to 39,000,000 francs, the imposts of the Germans to 49,000,000, and the requisitions to 327,000,000, totally 415,000,000. When the armistice was signed at Versailles, January 28, 1871, by its terms, Paris was to pay 200,000,000 francs, 6,530,244 francs of which were deducted during the days following the ratification of the preliminaries of peace.

The daily requisitions for the Germans occupying Versailles were 120,000 loaves of bread, 80,000 pounds of meat, 90,000 pounds of oats, 27,000 pounds of rice, 7,000 pounds of roasted coffee, 4,000 pounds of salt, 20,000 litres of wine and 500,000 cigars.[34]

In this war, the French troops levied requisitions on their own countrymen in several instances.[35]

In Prussia, during the years 1870-1871, "a syndicate of bankers was formed for advancing money to towns unable to meet requisitions and contributions; 4,000,000 francs were advanced to Nancy, through this channel."[36]

In the Russo-Japanese War, material and services were requisitioned by the Japanese army in Manchuria with military checks redeemable in coin. Prices were settled, as fairly as possible, by the Chinese Chamber of Commerce, lists were publicly posted and the army complied with these schedules.[37] This practice seems as just, enlightened and advanced as any recorded.

Contributions and Requisitions Allowed.

We find ourselves then constrained to admit that the right of exacting contributions and requisitions within territory held by military occupation in time of war has been fully established, constantly exercised, and accepted in most great European wars, for a period of two or three centuries, as a great improvement on the old system of loot and pillage. Moreover, it is equally well established that the exactions should be limited to what is reasonable and practicable, having in view the resources and situation of the community from which they are demanded. Hall sums up the matter as follows:[38]

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[34]Halleck, International Law (4th ed.) Vol. II, 89.

[35]Halleck, *loc. cit.*

[36]Edwards, Germans in France.

[37]Takahashi, International Law as Applied to the Russo-Japanese War, 260.

[38]Hall, International Law (6th ed.) 423.

"No usage is in course of formation tending to establish or restrain within specific limits the exercise of rights to levy contributions and requisitions. The English in entering France in 1813, the army of the United States during the Mexican war and the allied forces in the Crimean war abstained wholly or in the main from the seizure of private property in either manner; but in each case the conduct of the invader was dictated solely by motives of momentary policy and this action is thus valueless as a precedent."

Heffter[39] says requisitions are, even to-day, indispensable to all armies of invasion, and confirms the statement that abstinence in the wars last mentioned was merely a matter of policy. He thinks, however, that "contributions to-day are exceptions justified only by special reasons."

Hall says,[40] "the former custom of pillage was the most brutal among the recognized usages of war. The suffering which directly attended it was out of all proportion to the advantages gained by the belligerent applying it; and it opened the way to acts which shocked every feeling of humanity. In the modern usage, however, so long as it is not harshly enforced, there is little to object to; as the contributions and requisitions, which are the equivalents of composition for the pillage, are generally levied through the authorities who represent the population, their incidence can be regulated; they are moreover unaccompanied by the capricious cruelty of a bombardment, or the ruin which marks a field of battle."

This would apply in the present war to the exactions from Brussels; but Antwerp and various other cities suffered "the cruelty of a bombardment" prior to occupation and the exactions of the German commanders.

As to the Rights of a Naval Force.

The precedents on the subject under discussion have been, up to this time, it is believed, confined to operations by land forces.[41] In 1882, however, Admiral Aube of the French Navy published an article in the *Revue des Deux Mondes* suggesting that "armored fleets in possession of the sea might hold coast towns mercilessly to ransom", and advocated this as the true policy of France in the event of war with England. England interrogated France

[39]Heffter, *Droit International* (Bergson's translation) 301-302.

[40]Hall, International Law (6th ed.) 420.

[41]Oppenheim, International Law, Vol. II, 219.

as to her responsibility for this doctrine and France dissociated herself from it, but, presently, appointed Admiral Aube Minister of Marine and permitted him to change the program of ship-building so as apparently to facilitate the proposed measure. In the English maneuvers of 1888-1889 the practice was adopted and imaginary contributions levied on various English cities, including Liverpool. Professor Holland objected in the *Times*, lest this establish a precedent for enemies; correspondence followed, and various naval officers of authority combatted Professor Holland's views. It has since become known that in 1878 the Russian fleet at Vladivostok was intended to lay the undefended ports of Australia under contribution if hostilities broke out.[42]

Hall thinks such requisitions lawful, but that contributions can not be exacted unless a force is at least ready to land and actually take possession.[43] He regrets that in the naval maneuvers of 1889 a practice, wholly indefensible, was adopted, two officers being sent into Peterhead and Edinburgh—the demands being by a force entirely unprepared to land.

Dr. Oppenheim thinks Hall's arguments logically correct, but doubts whether the future practices of naval war will conform to his views and says that there is no doubt that towns which are defended can be bombarded. Latifi, however, thinks, and, I submit, rightly thinks, Hall's point erroneous and that he has confused a "right, with sanction for its enforcement."[44]

In 1896 the Institute of International Law at the meeting at Venice adopted a series of resolutions holding the rules of bombardment should be the same in land war and sea war, and apparently approving the bombardment of undefended towns for various special purposes and among others:—

"For the purpose of obtaining by requisitions and contributions what is necessary for the fleet," but,

"Bombardments of which the object is only to exact a ransom are specially forbidden."

The United States Naval War Code in forbidding the bombardment of open towns makes an exception "where the reasonable requisitions are not complied with."[45]

Let us hope that the practice of that Spanish Archduke will

[42]Hall, International Law (6th ed.) 427-428; Oppenheim, International Law, Vol. II, 219.

[43]Hall, International Law (6th ed.) 430.

[44]Latifi, Effect of War on Property, 35.

[45]Oppenheim, International Law, Vol. II, 220-223.

not be esteemed a valid precedent, who, during the wars in the low countries, "hanged twelve sick Dutch soldiers made prisoners in a stranded vessel on the plea that they were taken at sea where there were *no laws of arms to be observed.*"[46]

The Brussels Conference.

In 1874 a conference of delegates representing Great Britain, Germany, Russia, Sweden and Norway, the Netherlands, Belgium, Switzerland, Greece, Italy, Austria, Denmark, Spain and France met at Brussels and adopted a *Project of an International Declaration Concerning the Law and Customs of War.* The United States declined to participate on account of the lateness of the invitation. Great Britain limited her participation and declined wholly to be bound by the results.[47]

Fifty-six rules were adopted and those touching on the topics discussed provide as follows:

"XL. As private property should be respected, the enemy will demand from parishes, communes or the inhabitants, only such payments and services as are connected with the necessities of war, generally acknowledged, in proportion to the resources of the country, and which do not imply with regard to the inhabitants, the obligation of taking part in the operations of war against their own country.

"XLI. The enemy, whether as equivalent for taxes (*Vide* Art. V.) or for payments which should be made in kind, or as fines, will proceed as far as possible, according to the rules of the distribution and assessment of the taxes in force in the occupied territory, the civil authorities of the legal government will afford their assistance if they have remained in office, contributions can be imposed only on the order and on the responsibility of the general in chief, or of the superior civil authority established by the enemy in the occupied territory. For every contribution a receipt shall be given to the person furnishing it.

"XLII. Requisitions shall be made only by the authority of the commandant of the locality occupied. For every requisition an indemnity shall be granted or a receipt given."[48]

It will be observed that indemnities or receipts are required in all cases, but there is no provision of any sort for making good the receipt.

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[46]Stockton, Outlines of International Law, 40, quoting Grotius, p. 398.

[47]Halleck, International Law (4th ed.) Vol. I, 609, merely says that no nation was bound.

[48]See Scott's Texts of Peace Conference at the Hague, 387.

The Laws of War on Land, recommended by the Institute of International Law at Oxford in 1880, contained almost identical provisions; sections 56 to 60.[49]

The Hague Conference of 1907 in its turn adopted rules almost identical with the above, articles 51 to 53; but as to matters in the closing paragraph of article 52 it went further and provided that "contributions" in kind shall, as far as possible, be paid for in cash, if not a receipt shall be given and the payment of the amount shall be made as soon as possible.[50]

Professor Holland had definitely stated this lack of obligation to pay the amounts receipted for. In his *Law of War on Land* he shows that a Swiss proposal, offered at the First Hague Conference, requiring such payment, was deliberately rejected.[51] Later in his letters to the *Times*,[52] however, he shows that the modification was adopted at the Second Hague Conference but only as to "requisitions", and that it does not apply to "contributions".

Professor Westlake, and no one's opinion is entitled to more weight, thinks the restriction of the Hague Convention limited "contribution, so far as not expended on the administration of the occupied territory, to an equivalent for requisitions", and thinks it "not intended to permit the levy of money to be spent in the invader's own country in supplying the necessities of his army. The provision made at home must be borne by him out of his general resources, except so far as he may be able to recover its cost from the enemy as a war indemnity at the peace."[53]

Dr. Hans Wehberg[54] thinks the whole regulation as to contributions being in proportion to the resources of the country, practically devoid of meaning, saying: "No heed can in reality be paid to this, because the welfare of the soldiers comes first." This conclusion, which he published in 1911 has, it is feared, been strongly confirmed by the events of 1914.

The Declaration of London.

The Declaration of London of 1909, which was understood to codify and make definite the laws of naval warfare, was refused confirmation by Great Britain. The United States, though the Declaration was duly confirmed by the Senate, has in consequence

[49] *Idem*, 396.
[50] "*Sera effectué le plus tot possible*," Scott's Texts, 227.
[51] Holland, Law of War on Land, 51.
[52] Holland, Letters to the Times, 63, 64.
[53] Westlake, International Law, Part II, 101.
[54] Wehberg, Capture in War on Land and Sea, 45.

declined, through its Department of State, to be bound by it in the present war.

As the New York *Mail* recently observed, "The Declaration of London is thrown into a scrap heap," and if any of its provisions might, by their terms, appear to affect the present question they may safely be disregarded.

Air Craft.

The question of the right to requisitions and contributions on the part of air craft, threatening injury in case of refusal of their demands, so far as the writer has observed, has not arisen; but the principles applicable are merely those discussed above as to like demands by a naval force, only more *intensified* by the still more marked inability of the probable aerial force to take possession and the far greater limit to supplies needed by such force. Moreover, the rules of land war, it is believed, might apply.

Limits on Demands.

When we come to consider the limit which the law of war puts upon requisitions and contributions, it appears that the more respected military authorities and writers, the Institute, the provisions of the United States Naval Code, the rules adopted at the Hague as to land war and at the Conference of London as to naval war, limit them exclusively to the needs of naval and military forces in the locality, or of local administration, and forbid extortion.[55]

As we have seen, the levies must be reasonable and proportioned to the resources of the district or person assessed, both by the better authorities prior to 1907, and since then by the Hague regulations. No precedent, it is believed, exists as to relief in case this just and enlightened rule is exceeded.

It is suggested that a right to recover such excess might be asserted in the Hague Court on the return of peace, but the treaty of peace will probably, in all cases, adjust, provide for or terminate such claims. The victor dictates the terms of that instrument and the conquered submits, and thus the rule is still "Woe to the Vanquished."

The levy of contributions is stated as "a great exception to the general rule of the immunity of private property" by Latifi, in his monograph, *Effects of War on Property*.[56]

[55]Oppenheim, International Law, Vol. II, 146-150.

[56]Latifi, Effects of War on Property, 32.

He cites as examples of demands not justified by international law, Blücher's demand of 100,000,000 francs from Paris to pay his troops in 1815; also the Prussian exactions from German cities in 1866, and from French cities in 1870-1871. He says at Orleans General von der Thamm exacted 6,000,000 francs in one day; Rouen had to find 6,500,000 francs in five, whilst the little town of Haguenau was compelled to borrow from the bankers of Basle to pay its contribution of 1,000,000 francs. "Contributions of this kind," he continues, citing Bluntschli, "do not differ from general pillage except in name, and are not allowed by International Law."

I would respectfully submit that, unjust as they may be, they differ in all essentials from "general pillage", as is shown by the fact that they are met and discharged by orderly procedure.

As we have said, it is impossible fairly and justly to discuss the contributions and requisitions now being exacted by the German commanders in Belgium because the facts can not at present be fully examined and ascertained.

If, however, they are at all as commonly reported, it seems impossible to reconcile them with the rules of the Hague that they should be "in proportion to the resources of the country." The country is devastated, in distress and ruin, the people starving and objects of international charity on an enormous scale.

We must observe that the statement of Hall that, "The amount both of contributions and requisitions is fixed at the will of the invader," *remains in his text in the 6th edition of 1909, edited by Atlay,* and the notes do not mention any modification of the statement as required by the present state of the law.[57]

Dr. M. A. Pearce Higgins, in discussing the provisions of the Hague regulation, justly says the limitation means "that the inhabitants are not to be left in a starving condition";[58] yet, at page 65, he shows that the restraints of the law of war are utterly inadequate to prevent a *stern* and successful commander from causing inhabitants to suffer so that they must long for peace, in accord with the theory advanced by General Sherman.

Lammasch, the eminent Austrian representative at the Hague in 1899, urged that the enemy's strength should be exhausted by contributions and requisitions to hasten the termination of the war; but Dr. Hans Wehberg, in his *Capture in War on Land and*

[57]Hall, International Law (6th ed.) 422.

[58]Higgins, War and the Private Citizen, 61.

Sea,[59] successfully controverts this doctrine, and shows that it would overthrow all limitations and is no longer permissible.

Mode of Enforcing.

Hostages may be taken and held in confinement to enforce the satisfaction of demands of the character discussed.

The Governor General of Rheims in the Franco-Prussian War, ordered the confinement in Germany of various notables as hostages, as a guarantee of payment of sums due by the communes, and the order was partly carried out.[60] On failure to comply with the demands at the time specified "the invader takes such measures as may be necessary to enforce compliance at the moment or to guard by intimidation against future disobedience."[61] In illustration, Hall shows that when at Nancy in 1871 the Germans had requisitioned 500 workmen who were not forthcoming, works of the Department and the operation of the more extensive private factories were ordered suspended, and notice given that, on continued failure to respond, the inspectors and a certain number of workmen would be seized and shot.[62] The power of enforcement seems comparable to that of a civil court to compel compliance with its own decrees, which powers are indefinite, plenary and, in wrong hands, may prove cruel and harsh to the last degree. The higher court intervenes in various ways to prevent this, as by writ of prohibition, but no such intervention or review is practicable in these operations of war and the power of enforcement has few, if any, checks or limitations. However, any belligerent party, who violates the Hague regulations, by the terms of those regulations: "Shall, if the case demands, be held liable to make compensation. It shall be held responsible for all acts committed by persons forming part of its armed force."[63]

The usual mode of punishing a community collectively, is by imposing a fine. The German *Kriegesgebrauch im Landkriege*,[64] lays this down as the most effective means of bringing a civil population to book. Bluntschli admits that the Germans stretched

[59]Wehberg, Capture in War on Land and Sea, 42.

[60]Calvo, Vol. IV, § 2254.

[61]Hall, International Law (6th ed.) 422; Higgins, War and the Private Citizen, 62-63.

[62]See also Heffter, *Droit International* (Bergson's translation) 302.

[63]Fourth Hague Conference (1907) Art. 3, and Hershey, Essentials of International Public Law, 417.

[64]*Kriegesgebrauch im Landkriege*, 65.

this right beyond proper limits in 1870, and the Hague regulations expressly forbid a general penalty for acts for which the community "cannot be considered collectively responsible."[65] But as Professor Hershey, in his valuable notes at the above reference, shows, "the act punished need not necessarily be a violation of the laws and customs of war. Any breach of the occupant's proclamations or martial-law regulations, may be punished in this way." Moreover, punishment of this sort is allowed by way of reprisal. He shows further that "there is nothing unfair in holding a town or village collectively for damages done to waterways, telegraphs, roads, and bridges in the vicinity; it is the practice in all wars."[66]

Even so enlightened and humane a writer as Vattel, who remains to-day in many ways a light and guide to us in matters of humanity, while strongly condemning unnecessary hardships or destruction, and demanding "moderation, even in the most just war" makes an exception to all such limitations "where there is question of punishing an enemy." He shows that licentiousness is unavoidably suffered to pass with impunity and, to a certain degree, tolerated between nation and nation. "How then, shall we," he says, "in particular cases, determine with precision to what lengths it was necessary to carry hostilities in order to bring the war to a happy conclusion? And even if the point could be exactly ascertained, nations acknowledge no common judge; each forms her own judgment of the conduct she is to pursue in fulfilling her duties. If you once open a door for continual accusations of outrageous excess in hostilities, you will only augment the number of complaints, and inflame the minds of the contending parties with increasing animosity: fresh injuries will be perpetually springing up; and the sword will never be sheathed till one of the parties be utterly destroyed."[67]

Even at the present day, with the resources of the Hague regulations and tribunals, the conclusions of Vattel can not be wholly disregarded. Almost all of the rules of war, founded on humanity, are subject to an exception in case of "military necessity" which, like necessity in general, "knows no law". The judgment of the soldier, high or low, must often be exercised suddenly, in circumstances of almost frantic excitement, confusion and uncertainty as to many facts, when even the slightest pause may involve defeat

[65]Hershey, Essentials of International Public Law, 413.

[66]See also Bordwell, Law of War, 316-317.

[67]Vattel, Law of Nations, Book III, c. IX, § 172.

and destruction, death of colleagues and frustration of vital military operations. To pass upon such sudden and summary action in a judicial tribunal, sitting in cold review, with all the facts displayed and *marshalled* would impose a terrible danger on the soldier, and the knowledge that this might ensue would help to paralyse his action. Whether such a tribunal could act effectually and wisely, must be questioned. The present writer is in receipt of a letter from an eminent English judge of the highest rank, learning and character, expressing the hope that at the end of the present war an international tribunal may be arranged to try those who have violated the laws of war, and that those who have flagrantly so offended may be convicted and shot. Terrible as is the guilt of those who wantonly violate the laws of war and inflict rigors beyond those which these harsh laws allow, yet a long series of trials at the end of the contest, in which officers and men on each side should be accused, prosecuted and put to death could not be tolerated. They would so endanger and embitter the relations of the nations, needing and seeking peace, that war would revive. Better the rule of the Hague regulations that the belligerent is "responsible for all the acts committed by persons forming part of its armed force." Let the offending *nation* be compelled to make financial reparation for such excess as far as possible, but do not attempt execution upon the individual.

Burkheimer, in his excellent work on *Military and Martial Law,* says no instance is recalled where sufferers were indemnified by their own government.[68]

In the present war, in which the practice of each belligerent is denounced by the other, we are reminded of Montesquieu's famous saying that "all countries have a law of nations, not excepting the Iroquois themselves, though they devour their prisoners, for they send and receive Ambassadors and understand the rights of war and peace. The mischief is that their law of nations is not founded on true principles."[69]

As Rear Admiral Stockton declares in his *Outlines of International Law,* published some months after the present war had broken out: "In the occupation of territory, as suggested in preceding pages, the private citizen suffers in so many ways as to his person and property that it can be truthfully said that the

[68]Burkheimer, Military and Martial Law, 209.

[69]Montesquieu, Spirit of the Laws, Book I, c. III; Bordwell, Law of War.

so-called exemption of private property from capture or seizure on land may be called almost nominal."[70]

The regulations in force seem too indefinite, too subject to the law of supposed necessity, to protect the civil population from exactions and hardships almost as ruinous as the old pillage and loot. It is plain that one of the first duties of a period of peace will be their revision. The interest of the civil population must be adequately protected and the severities of war must be, more and more, confined to military and naval forces. That purpose must not be abandoned. The lessons of the present war enforce its necessity with appalling vigor. The task is difficult without question, but the necessity is imperative. In all wars, even in the present one, the civil population vastly outnumbers the military; its protection is, therefore, paramount.

We can not do better in closing, than to quote Woolsey's admirable statement. After admitting that requisitions and contributions are still *permissible,* and after defining them, he says: "Cruelty and inhumanity are as unavoidable in such transactions as they would be if the sheriffs and their men were to levy on goods by force of arms and pay themselves out of the things seized, moreover, requisitions are demoralizing and defeat their own ends. They foster the lust of conquest. They leave a sting in the memories of the oppressed nations who, when the measure of iniquity is full, league together to destroy the great plunderers of mankind. The only true and humane principle is that already laid down, that war is waged by state against state, by soldier against soldier"; and if the rule is observed, if the civil population in person and property is exempt from all but incidental injury and suffering, then we comply with the great principle of modern international law which Talleyrand quoted to Napoleon in 1806, "that nations ought to do to one another in peace, the most good, and in war, the least evil possible."[71]

In this time of conflict and confusion, when even steadfast men have begun to feel that all progress has ended and the rule of blood and cruelty has resumed its lawless sway, I venture to quote an elevated passage from Whewell's preface to his translation of Grotius' *De Jure Belli et Pacis,* which seems appropriate. It is as follows:

"The progress of the study of International Law on such principles as those of Grotius, and the increase of a regard for the

[70]Stockton, Outlines of International Law, 314.

[71]See Woolsey, International Law, 221, note.

authority of such law, are among the most hopeful avenues to that noble ideal of the lovers of mankind, a perpetual peace, the most hopeful because along this avenue, we can already see a long historical progress, as well as a great moral aim."[72]

We may, it is submitted, in the history of contributions and requisitions in war, discover the same "long historical progress" and in that progress, we also observe "a great moral aim", which we can not abandon and of which we must not despair.

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[72]Grotius, *De Jure Belli et Pacis* (Whewell's translation) Vol. I, preface, xii.

THE POWERS OF COURTS OF EQUITY.

III. Legal effects of equitable decrees.

To a considerable extent the legal effects[1] of equitable decrees have already been discussed, but there remain to be considered certain phases of the matter not directly connected with our discussion of equitable procedure. It must first be noted that it has often been denied that, in the absence of statutes, equitable decrees have legal effects comparable to the effects of judgments at law. In this connection one learned writer says:

"Indeed, it may be stated broadly that a decree in chancery has not in itself (*i. e.*, independently of what may be done under it) any legal operation whatever. If a debt, whether by simple contract or by specialty, be sued for in a court of law, and judgment recovered, the original debt is merged in the judgment, and extinguished by it, and the judgment creates a new debt of a higher nature, and of which the judgment itself is conclusive evidence. But if the same debt be sued for in the court of chancery (as it frequently may be) and a decree obtained for its payment, not one of the effects before stated is produced by the decree. Undoubtedly it has often been said by chancellors that their decrees are equal to judgments at law, but that only means that they will, to the extent of their power, secure for their decrees the same advantages that judgments have by law; it does not mean that a decree is by law equal to a judgment. Again, if a claim be made the subject of an action at law, and judgment be rendered for the defendant upon the merits, the judgment is conclusive evidence that the claim was not well founded, and it will therefore furnish a perfect defence to any future action upon the same claim; but a decree in equity against the validity of a claim is never a defence to an action at law upon the same claim. Here again, however, the chancellor will make his decrees equal to judgments so far as it is in his power to do so; and therefore a decree in chancery against a claim upon its merits will always be a defence to any future suit in chancery upon the same claim, not as destroying the claim or as proving conclusively its invalidity, but as furnishing a sufficient reason why chancery should not again take cognizance of it. Such a decree will also be (what is sometimes called) an equitable defence to any action at law upon the same claim, *i. e.*, the chancellor will enjoin the prosecution of any such action, upon the ground that the plaintiff having elected to make his claim the subject of a suit in equity, and that suit having been defended

[1] The phrase "legal effects" is here used as including the effects both at common law and in equity. There is unfortunately no term in common use which exactly covers both. We shall therefore have to speak of the "legal effects at common law" and the "legal effects in equity."

successfully upon the merits, it is not right that the defendant should be vexed again by the same claim."[2]

If these statements are correct, the doctrine of *res judicata* has no application to the adjudications and decrees of courts of equity. That the doctrine does apply to courts of equity is, however, asserted by other writers in the most unmistakable terms. For example, one writer says:

"A decree in chancery, like a judgment at law, when rendered on the merits, is final and conclusive upon the parties, not only as to facts or issues actually decided, but as to all points necessarily involved in the matter adjudicated."[3]

The same view is announced by the Supreme Court of the United States in many cases, from one of which we may quote:

"We hold no doctrine to be better settled than this, that whenever the parties to a suit and the subject in controversy between them are within the regular jurisdiction of a court of equity, the decree of that court solemnly and finally pronounced, is to every intent as binding as would be the judgment of a court of law, upon parties and their interests regularly within its cognizance."[4]

This divergence of view seems to be due to the fact that apparently the learned writer first quoted was confining his attention to the English court of equity as it existed down to the time of Lord Eldon or a little later. Even at that time it seems that it was not regarded as a court of record. The old notion of the chancellor as the King's Secretary administering justice for the King, apparently still persisted to that extent. But this view seems not to have been accepted in America after we started on our separate existence, and is certainly not true to-day, for with us the court of chancery is as much a court of record as a court of law.[5] So soon as this latter view prevailed, the application of the doctrine of *res judicata* to chancery adjudications and decrees was to be expected.

In view of the statements of the writer first quoted, and of the wide currency they have received both because of the eminence of their author and because they are reprinted without annotation in the introductory part of one of the most widely used case-

[2]Langdell, Summary of Equity Pleading (2nd ed.) 35, note 4. It seems that the learned writer means to include under the phrase "legal operation" the legal effects both at law and in equity.

[3]2 Black, Judgments (2nd ed.) § 517. The same view is expressed in Freeman, Judgments (4th ed.) § 428.

[4]Pennington *v.* Gibson (1853) 57 U. S. 65.

[5]Story, Equity Pleading (10th ed. by Gould) § 778, note 5; Thrall *v.* Waller (1841) 13 Vt. 231.

books upon equity,[6] it seems worth while to re-examine the matter in the light of the modern cases, with special reference to the American authorities. In doing so we shall have to consider the legal effects of equitable decrees in (1) courts of equity, and (2) courts of law. Incidentally and for the purpose of comparison we shall find it worth while to notice briefly the legal effects in equity of common law judgments.

Let us begin by considering the concrete cases put by the writer first quoted. Take the case where after a hearing on the merits a decree is made against the validity of a claim.[7] The statement is that the "decree against a claim on its merits will always be a defence to any future suit in chancery upon the same claim, not as destroying the claim or as proving conclusively its invalidity, but as furnishing a sufficient reason why chancery should not again take cognizance of it." It is also stated by the learned writer that if the plaintiff obtain a decree in his favor, the claim is not merged in the decree in the same way that a claim at law is merged in a judgment. Now it is certainly true to-day in every court of equity that so long as the decree stands unreversed, the same matter can not be litigated again in equity, and as chancery is a court of record, it seems difficult to believe that there can be any difference in the theory applied by the courts of law and equity respectively. In any event, we are not left to speculate about the matter, for our American courts of equity are entirely clear that there is no difference. Hear what a modern court of equity, in a jurisdiction in which a separate court of equity is still maintained, has to say upon the matter: "It is settled that a verdict and judgment of a court of record or a decree in chancery, puts an end to all further controversy concerning the points thus decided between the parties to the suit. . . . If the decree (in favor of the plaintiff) is final, its result is to merge the original cause of action".[8]

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[6]Keener, Cases on Equity Jurisdiction, 8-9, note.

[7]"The order for dismissing a bill at the hearing is not usually termed, in the books, 'a decree', but merely an 'order of dismission'; but, to prevent confusion, it is thought best to designate it as 'a decree', to distinguish it from 'an order to dismiss', made upon motion." 2 Daniell, Chancery Pleading & Practice (6th Amer. ed.) *933, note 9.

[8]Reed, J., in Mutual Insurance Co. *v.* Newton (1888) 50 N. J. L. 571, 577. Of course if a bill is dismissed for the reason that plaintiff is not entitled to equitable relief, while the decree would be a bar to another equitable suit, it would usually be left open for plaintiff to sue at law, the dismissal being "without prejudice". In some cases a bill may be dismissed without prejudice to the filing of a new bill. 2 Daniell, Chancery Pleading & Practice (6th Amer. ed.) *993-994.

The doctrine of *res judicata* is of course much wider than anything we have thus far discussed. For our purposes the following statements by the Supreme Court of the United States are sufficiently accurate:

"The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."[9]

It will be seen that this language does not require the adjudication to be by a court of law. All that is required is that it be a "court of competent jurisdiction". Equity is such a court, and accordingly our modern American cases hold that the doctrine in its full extent does apply to the adjudications of equity.[10]

It will also be noticed that these quotations from modern decisions do not say merely that the matter can not be litigated again in equity. They simply say that it can not be litigated again, meaning, apparently, in any court. May we therefore conclude that where a question has been litigated and settled by a court of equity, the matter is *res judicata* not only in equity but at law? And may we reverse the statement and say that if the matter is settled by a law court, the same matter is *res judicata* in equity?[11] If the writer first quoted on this question be correct, these questions are to be answered in the negative. If the language of other writers and of modern courts is to be taken at its face value, the answer will be an affirmative one. The matter

[9]Southern Pacific Ry. *v.* United States (1897) 168 U. S. 1, 48.

[10]The current of authorities is so uniform that to cite cases is almost superfluous. Many citations are given in 2 Black, Judgments (2nd ed.) § 517. Good examples are: Chiles *v.* Champenois (1891) 69 Miss. 603; Preston *v.* Rickets (1886) 91 Mo. 320; Chouteau *v.* Gibson (1882) 76 Mo. 38. The latter case is of especial interest. The first equitable adjudication was an equitable counterclaim to a legal action. The decision was adverse to the counterclaim. Later the former defendant as plaintiff brought an equitable action on the same claim. A plea of *res judicata* was allowed. Had the defense in the original action been a legal defense, no such effect would have followed, since Missouri still follows the common law rule that one ejectment does not bar another. See, however, Idalia Co. *v.* Norman (Mo. 1914) 168 S. W. 749.

[11]Of course, care must be taken to see that an attempt is being made to litigate the same matter again. Very often it is a different matter that the court of equity is asked to pass upon, and of course plaintiff is entitled to a hearing.

must of course be settled by the decisions in the cases. Let us examine them from this point of view. In *Young* v. *Farwell*[12] an action at law was brought to recover the reasonable value of services rendered by the plaintiff to the defendant. The defendants answered that the services were rendered under an express contract which had been complied with; also that plaintiff had brought an action against the defendants in the chancery court of Illinois in which a final decree was rendered in favor of the defendants and that the same was a final and conclusive adjudication upon the merits as to the cause of action alleged in the present action. The record of the adjudication of the Illinois court of equity was introduced in evidence, and the New York court found that "as the issue was framed in the Illinois suit, the precise question was presented for determination, and was determined, as was presented in this suit". This being so, the New York court held that the previous adjudication in equity was a bar to litigating the same question at law. The court said:

"It makes no difference that the judgment, or decree, set up by way of estoppel, was one rendered in an equitable action for an accounting; provided that the question involved in this common-law action was involved and determined in the equity action. That a decree rendered in a cause, depending between parties in equity, may be a bar to an action at law between them cannot be questioned. It turns upon the scope of the decree. If the same general question furnished the subject-matter of the controversy—if the material issue was the same in each action—the prior decree must be regarded as conclusive, under the authorities. If the court, which rendered the prior judgment between the parties, had jurisdiction of them and of the subject-matter of their controversy, the principle of its finality is unaffected by the nature of the proceedings which led to the rendition of the judgment. The law of estoppel is equally applicable. A prior judgment, whether rendered in an action at law, or in equity, concludes the parties upon the material issues and is conclusive as to all facts comprehended within the issues submitted, which were relevant and material and which were so related to the issues that their determination was necessarily involved."

Another case from the same jurisdiction presented the following state of facts: In the previous equitable action a municipal corporation, the present defendant in the court of law, had sought to obtain the cancellation of certain bonds as invalid. The only issue presented and tried was that of the validity of the bonds

[12](1901) 165 N. Y. 341.

and the court of equity adjudged the bonds valid. One of the holders now sued the municipal corporation on some of the bonds, and the defense was the alleged invalidity. The court of law held that this matter was *res judicata* and could not be litigated again. The court said: "It is of no consequence that the judgment was in equity. . . . The town has had its day in court, a full opportunity to assail and test the bonds, a patient hearing and direct decision upon all the questions now raised. It would be hard to find a case to which the doctrine of *res adjudicata* could more justly and clearly apply than this."[13]

So clear and unanimous are the modern cases upon this point that it is not worth while to give other examples at length. A few are cited in the footnote.[14] A brief search of the digest will reveal many more. In view of these authorities, what shall we say of the dictum of the Supreme Court of the United States in *Hart* v. *Sansom*[15] that "upon a bill for the removal of a cloud upon title, . . . the decree, unless otherwise expressly provided by statute, is clearly not a judgment *in rem,* establishing a title in land, but operates *in personam* only by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be cancelled, or to execute a release to the plaintiff." The learned judge who wrote this opinion refers for authority to the book in which is found the quotation given above, denying legal effects to equitable decrees, citing the very section containing the words above quoted. If this statement of the learned judge in *Hart* v. *Sansom* means anything, it means that the determination of the legal title would not be *res judicata* at law because of the adjudication in equity. Fortunately this was merely a dictum and not a part of the decision, and it is shown to be erroneous by numerous decisions to the contrary.[16] Is it not time for judges and writers to stop talking language suitable to the time of Coke in discussing the power of equity,

[13]United States Bank *v.* Town of Solon (1893) 136 N. Y. 465, 480.

[14]Coit *v.* Tracy (1830) 8 Conn. 268; People *v.* Rickert (1896) 159 Ill. 496; Foster *v.* Busteed (1868) 100 Mass. 409, (semble); Powers *v.* Chelsea Savings Bank (1880) 129 Mass. 44; Winans *v.* Dunham (N. Y. 1830) 5 Wend. 47; Bradley *v.* German-American Insurance Co. (1898) 147 Mo. 639; Hopkins *v.* Lee (1821) 19 U. S. 109, (semble). See also Freeman, Judgments (4th ed.) § 428, and cases cited.

[15](1884) 110 U. S. 151.

[16]For examples, see: Peoples' Bank *v.* Eberts (1893) 96 Mich. 396; State *v.* Boller (C. C. 1889) 47 Fed. 415; Van Fleet, Former Adjudication, § 314 *et seq.*

and to recognize that a court of equity is a legal tribunal with power to adjudicate and settle controversies as finally as a court of law?

It should, of course, be equally true that when a matter has been adjudicated by a court of law, it is *res judicata* in equity. The authorities on this are equally uniform and emphatic, as was to be expected, since the rule merely requires that the matter be settled by a court of competent jurisdiction.[17]

It follows from this broad doctrine followed by modern courts that if a debt be sued for in chancery, as it frequently may be, not only is the original cause of action merged in the decree, so that it can not be sued on again in equity, but it is also so merged in the decree that it can not be sued on again at law. For example, in *Mutual Fire Insurance Co.* v. *Newton*,[18] an action was brought for the balance due on a bond after foreclosure proceedings had been had on the mortgage given to secure the bond. The defendant pleaded that the sum sued for was the amount of a deficiency declared and decreed by the Court of Chancery as still due and owing upon the bond after the foreclosure; and that a deficiency decree of the Court of Chancery for its payment was duly rendered. This was held a good plea, on the ground that "when the plaintiff invoked the Court of Chancery to give him the statutory decree for deficiency, and he obtained it, his right to bring a new suit on the bond was gone." Of course decisions of this kind must be put into their proper setting; that is, we must remember that in New Jersey, as in most of the other States, the plaintiff was entitled to execution on his decree as though it were a judgment.[19]

So much for the question of the legal effects of equitable decrees in making a question *res judicata,* at law and in equity. It may, however, be argued that there is a difference between judgment at law and decree in equity for money, in that the former creates a new right—the debt of record—while the decree does nothing more than entitle the holder of it to the appropriate procedure for its enforcement which we have described at length in Part II. Indeed, the learned writer quoted above expressly

[17]The cases are cited in 2 Black, Judgments, (2nd ed.) § 518, note 73; also in Freeman, Judgments (4th ed.) § 248, note 5.

[18](1888) 50 N. J. L. 571.

[19]We must be very careful, in applying this doctrine, to be sure that there was really only one cause of action which could be enforced in either tribunal, as in the case put.

asserts that this difference exists. He says that the common law judgment, among other effects, "creates a new debt of a higher nature", but that "if the same debt be sued for in the court of chancery, (as it frequently may be), and a decree obtained for its payment, not one of the effects before stated is produced by the decree". If the decree has any effect of a kind comparable to that of the common law judgment in creating a debt of a higher nature, there are of course two possibilities: (1) that it creates a common law debt, *i. e.,* such a legal effect is attached to it by the common law; (2) that the decree creates an "equitable debt" of a higher nature. Before examining the cases, let us note that a judgment of one jurisdiction is by the common law of other jurisdictions recognized as creating a debt in these other jurisdictions; or, more accurately, the common law of one jurisdiction gives to the judgment of the court of the other jurisdiction the legal effect stated.[20] The question at once arises: Does either equity or the common law give to decrees for money rendered by foreign courts of equity a similar effect? With reference to an equitable decree for money, therefore, we have the following questions to answer: (1) Does an equitable decree for money create in the same jurisdiction a new obligation of some kind, and if so, is it an "equitable debt of record", *i. e.* an equitable obligation based upon the record of a court of equity; or is it a common law debt? (2) Can a decree for money be sued on in another jurisdiction, either as an equitable or a legal cause of action? While these questions are distinct, and one might be answered in the negative without affecting the answer to the other, it is convenient in dealing with the cases to consider them in connection with each other.

There seem to be no cases in which an attempt was made to assert that a domestic decree in equity for the payment of money gives rise in equity to a new cause of action based upon the decree, at least where there are no difficulties in the way of enforcing the original decree. Apparently there was no reason for doing this, as no advantage could thus be gained. At common law, execution had to be issued within a year and a day or the right to it was lost. Originally in the personal actions the judgment could not be brought to life again by *scire facias,* which,

[20]Whether such an effect is given to foreign judgments is purely a question of positive law. In the Civil Law, no such effect is attached to foreign judgments. 3 Beale, Cases on Conflict of Laws, 537.

until the Statute of Westminster II, apparently applied only to the "real actions". The only remedy in the personal actions was to bring a new action of debt on the record and obtain a new judgment. In chancery, however, it seems there was no such time limitation for the enforcement of decrees, and ordinarily, therefore, no new equitable action was necessary. Sometimes, however, it did become necessary, or at least convenient, because of things which had happened since the decree was made, to permit an equitable action to enforce a decree, and when this was so, a bill would lie for the enforcement of the decree.[21] The foundation of such a bill is the decree and not the original equitable cause of action, and it should follow that on such a bill the merits of the original controversy could not be gone into. In spite of some confusion in the cases (based chiefly upon dicta, and perhaps one or two decisions of individual chancellors) this seems to have been the prevailing view.[22] The question at once arises: If the original decree is obtained by fraud, can it, unless it be attacked by a bill to set it aside, be enforced by a bill to obtain a new decree; or can the defendant set up the fraud as a defence in his answer to the bill? If as suggested here there is a real analogy between judgment and decree, one would expect that, just as fraud in obtaining a domestic judgment is no defence to its enforcement, but the attack must be by a bill in equity filed for that purpose, so here fraud will be, not a defence, but the basis of a bill or cross-bill. While the authorities dealing with this question are not numerous, (doubtless because bills to enforce decrees are themselves uncommon), they are substantially unanimous in holding that the fraud in obtaining the decree can not be used as a defense to a bill to carry the decree into execution. They accordingly hold that if the decree is to be attacked for the fraud in obtaining it, it must be by bill filed for that purpose. An example of this is found in *Caldwell* v. *Giles*,[23] in which an administrator had filed a bill to obtain satisfaction of a decree for the payment of a sum of money, formerly obtained in the same court by the intestate against the defendant. Defendant in his answer set up that the original decree was obtained by the

[21]Mitford, Pleadings in Chancery (5th ed.) 95; Adams, Equity (4th Amer. ed.) 826.

[22]Minshull *v.* Lord Mohun (1711) 2 Vern. Ch. 672; s. c., on appeal, 6 Bro. P. C. 32. The cases are collected in Mitford, *loc. cit.*

[23](S. C. 1837) 2 Hill, Eq., 548. On the general subject see Mitford, *loc cit.*; Adams, Equity (4th Amer. ed.) 833; Carneal *v.* Wilson (1823) 13 Ky. *80; Edmondson *v.* Moseby (1830) 27 Ky. *497, 501.

intestate by fraud, by inducing witnesses to testify falsely. The chancellor held as follows: "There is no question, but that if a decree be obtained by fraud, it may be set aside on an original bill for that purpose. The only question is, whether the defendant can avail himself of this by his answer, so as to resist the performance of the decree. I am of opinion that he cannot." Accordingly, a decree for plaintiff was entered. On appeal, the higher court affirmed the chancellor's decision, saying that the matter raised by the defendant could be gone into "only on a bill to set aside the decree for the fraud complained of, and that course of proceeding is the only one recognized by the precedents". There are some dicta and perhaps decisions to the contrary, but it is suggested by Mitford that these are cases where the decree was not signed and enrolled.[24] Some of the cases can not be accounted for on that basis, but they are cases in which the new decree was sought by others than the original plaintiff, *e. g.*, creditors, assignees, etc., and the court stated that while ordinarily the rule was that the justice of the original decree could not be gone into on a bill to execute it, in these cases it could.[25] A failure to keep this difference in mind has led to much of the confusion, and doubtless to some real conflict of authority. In any event, "where a decree is capable of being executed by the ordinary process and forms of the Court, whatever the iniquity of the decree may be, yet, till it is reversed, the Court is bound to assist it with the utmost process the course of the Court will bear".[26] In other words: until set aside when directly attacked in the proper way, the decree, even though fraudulently obtained, gives the plaintiff the right to demand of the court and its officers all the usual remedies for its enforcement, including a new decree in a proper case.

Returning now to the decree for the payment of money: although it did not ordinarily give rise to a new cause of action in equity for the reasons stated above, the question remains, did it not form the basis of a common law action of debt? This question was raised in *Carpenter* v. *Thornton*,[27] in which an

[24]Mitford, *loc. cit.*, note *a*.

[25]As in West *v.* Skip (1749) 1 Ves. 239.

[26]1 Daniell, Chancery Practice (1st ed.) 194.

[27](1819) 3 B. & Ald. 52. A brief but valuable discussion of the principles upon which legal actions upon equitable decrees for money may be based is given by Professor Hohfeld in 11 Michigan Law Rev. 568. See also: Black, Judgments (2nd ed.) § 869; Freeman, Judgments (4th ed.) § 434.

action of assumpsit was brought on a domestic decree for the payment of a sum of money, which had not been complied with. The original cause of action was purely equitable. It was held that no action would lie, but the judges differed in the reasons given for the decision. Abbott, C. J., thought that if the decree had been based upon a cause of action which might have been sued on at law, as would often be the case, "a court of law might, perhaps, lend its aid to enforce such a decree". As it was, he concluded there was no "implied contract". His opinion is not helpful, for it fails to distinguish between an assumpsit on an actual contract implied in fact and a "contract implied in law" or quasi-contract. The other judges gave various reasons, nearly all really begging the question by assuming that the decree did not give rise to a common law debt. If it did not, then of course there was no "promise implied in law" to pay it. All emphasized the form of the decree as a mere "order to pay the money" and Holroyd, J., added: "The mode of enforcing such an order is by attachment, for contempt in not obeying the order of the court." How incomplete this statement is we have already seen in Part II. The inadequacy of the reasons given to account for the decision appears clearly in the subsequent case of *Henley* v. *Soper*,[28] in which an action of debt was brought on the decree of a colonial court of equity. This decree was for the payment of a sum of money found by the court of equity to be due from one partner to another after the court had had the proper account taken. The court held unanimously that debt would lie on such a decree. Apparently some of the judges seemed to think, and other courts later have had the same idea, that the colonial court of equity was enforcing by its decree a legal and not an equitable duty to account. Inasmuch as no action of debt would lie by one partner against the other unless an account had been stated between the parties; and as there was no common law action to compel an accounting in such a case,[29] but the only remedy was by a bill in equity, it would seem that the decree was based upon an equitable and not upon a legal duty

[28] (1828) 8 B. & C. 16.

[29] It seems that the common law action of account did not cover partners. To-day some courts doubtless permit an action at law where the account is a very simple one. The same thing has been allowed where the relation was purely equitable, as in the case of trustees where the sole remaining duty was to pay over a sum of money.

to account.[30] The real effect of the decision therefore is to permit an action of debt at law on the decree of the foreign court of equity, that decree being based upon an equitable and not upon a legal cause of action. It is worthy of notice that much is said in the opinions which is not in harmony with the opinions in *Carpenter* v. *Thornton.* Lord Tenterden, C. J., for example, says: "There is a great difference between the decree of a colonial court of equity and of a court of equity of this country. The colonial court of equity can not enforce its decrees here, a court of equity in this country may: and, therefore, in the latter case there is no occasion for the interference of a court of law, in the former there is, to prevent a failure of justice." This makes the decision in the first case depend not upon the fundamental characteristics of a decree as a merely personal order to pay, but upon the lack of necessity for a legal action. As a matter of fact, though the necessity for resorting to an English court appears in the case of a foreign decree, it by no means follows that it should be an English court of law. Why not ask the English court of equity to recognize the foreign decree as creating, according to English chancery law, a cause of action in equity, entitling the plaintiff to a new decree in England? Apparently this idea never presented itself to anyone concerned, yet this very thing was tried and seemingly with success many years before in *Morgan's Case.*[31] That case, however, seems not to have been known to the parties or the court in the principal case. We must also note that the learned judge went on to distinguish the principal case from *Carpenter* v. *Thornton,* on the ground that in *Carpenter* v. *Thornton* the matter was one of purely equitable jurisdiction, while here if an account were stated a court of law would deal with the matter. As already stated, this seems to involve some confusion of thought. The fact that a common law duty would arise if an account were stated, does not show that one exists before that time. Bayley, J., put the allowance of the action in this case upon much the same ground. He argued that since an action at law would lie on an account stated by the parties, "it cannot make any difference that the balance in the present case was settled by the Court instead of by the parties

[30]It may also be noted in passing that an action on account stated will lie where the statement is made because of a purely equitable relationship, as in the case of a trustee and cestui que trust.

[31](1737) 1 Atk. 408.

themselves out of Court". This is a sensible conclusion, but it must be noted that it is the decree of the colonial court that gives rise to the debt, for until the court has ascertained finally the balance due, there is no common law debt or duty to pay the money. Apparently Bayley, J., if he followed his logic out to its legitimate consequences, would permit an action of debt on a domestic decree founded upon a relationship of this kind. Holroyd, J., concurred on the ground that an action of debt would lie "upon the decree of a foreign court of equity if duly perfected". Apparently he would not limit the doctrine to the case of decrees based upon common law relationships.

With the English authorities in this condition, it was to be expected that there would be confusion and conflict in the American decisions. As a matter of fact, there is very little, at least in the modern cases. In discussing them, we must keep in mind the statutory innovations which were being introduced during the last century, permitting execution as at common law on equitable decrees, abolishing imprisonment for debt, etc., as described in Part II. It was to be expected that these changes would influence considerably the views of the American courts upon the question we are considering. Attention may again be directed in passing to the fact that apparently, even at the date of the case just referred to, the English Court of Chancery was not yet looked at by the common law as a court of record, a view not followed in America. This difference also must be taken into account in considering the American cases. Curiously enough the question of suing at law on a foreign decree was raised in America some years before the decision in the English cases just discussed. In 1805 the Supreme Court of New York was asked to pass upon the question in the case of *Post* v. *Neafie*.[32] A decree for the payment of money by defendant to the plaintiff had been made by the Chancery Court of New Jersey. An action of debt was brought in a New York court on this decree. Under the New Jersey statute of 1799, referred to in Part II of this article, common law execution could be issued to enforce decrees in New Jersey, and this undoubtedly influenced the decision somewhat. Counsel for the plaintiff argued, among other things, that the New Jersey Court of Chancery was a court of record, even if the English chancery court was not, and that therefore the action would lie. A majority of the court, (Kent,

[32](N. Y. 1805) 3 Caines, 22.

C. J., and another judge dissenting), held the action would lie. They admitted that there was no precedent for such an action. A portion of the opinion of Livingston, J., is worth quoting:—

"Debt, it is said, will not lie on the decree of a court of equity. In examining this point, I shall take it for granted, as is truly the case, that this decree is for the payment of money *only*. A mere equity, it is alleged, is no ground of relief at common law, and that the objects of equitable and legal jurisdiction, being so very different, it is impossible the former can be enforced by the tribunals of the latter. This may be correct in the first instance; but after the original ground of complaint has been litigated and *determined* in chancery, why should not its decree or judgment, if for the payment of money, be the ground of an action at law, as well as the judgment of any other court? That we have no precedent of this kind is easily accounted for. Decrees in equity are more generally for the performance of certain acts, to which common law courts cannot compel obedience, and therefore the successful party can, in such cases, obtain execution, only out of the same court."

As stated, Kent, C. J., dissented, chiefly on the ground that no precedent for the action could be found, arguing that "the reason why courts of law would not take cognizance of decrees, is . . . to be deduced from the history and peculiar jurisdiction of the court of chancery; and although the reason of the rule may not now be applicable to some of its decrees, yet we are not at liberty at this day to set aside the rule". He concluded by suggesting that an action could be brought on the decree in the New York court of chancery, citing *Morgan's case,* mentioned above.[33]

While the decision in *Post* v. *Neafie* undoubtedly had a large influence upon later decisions, the development which it started was inevitable if the same manner of execution was to be used for common law judgment and decree in equity. Consequently, ever since *Post* v. *Neafie* the line of authorities permitting an action at law on a foreign decree for the payment of money, where the decree is final and absolute, is practically unbroken. In 1823 the question arose in Pennsylvania, and the only authority in favor of the action that was cited was *Post* v. *Neafie.* The Pennsylvania court followed the New York court, saying: "It

[33]Another reason given by Kent, C. J., was that as the New Jersey decree was merely *prima facie* evidence of the truth of the facts, etc., the New York court of law might have to go into the equitable cause of action itself. As the Supreme Court of the United States later decided, the New Jersey decree was conclusive, and so this objection was not sound. See comment on Kent's opinion in Pennington *v.* Gibson (1853) 57 U. S. 65, 69-70.

is a general principle, that where a man is under an obligation to pay a *certain sum of money,* whether that obligation is founded on a contract, or the judgment of a court, an action of debt lies. On that principle, we support actions of debt on *foreign* judgments. And I confess, I see no reason why a decree in chancery, is not as strong as a foreign judgment."[34] A few of the many authorities are cited in the footnote.[35] In some, emphasis is placed upon the fact that, by the statutes of the State in which the decree was rendered, the decree is given the effect of a judgment at law. As this legislation is found almost everywhere, this limitation amounts to very little, even if it be accepted. No modern decision refusing the action at law on a foreign decree because of the absence of such legislation has come to the notice of the present writer, and many of the decisions make no mention of such a limitation. It may perhaps safely be concluded that such a limitation does not exist, at least in most jurisdictions. In the case of decrees for alimony, the action is sometimes denied because the particular decree is not final and absolute.[36]

The case of an action at law based on the decree of the court of chancery of the same jurisdiction has given the American courts little difficulty. Such actions are of course very rare, for as common law execution may now be had on decrees in most jurisdictions, little is to be gained by the action at law. In *Thrall* v. *Waller,*[37] an action of debt was brought on such a decree, and was allowed. Redfield, J., pointed out that the decree was based upon a partnership accounting, the very case in which, it was suggested by the dicta in *Carpenter* v. *Thornton,* a court of law might allow the action. No authority allowing the action was cited, however, and only the cases discussed above were mentioned. As a matter of fact many years before, in 1818, the Supreme Court of Massachusetts had permitted an action of debt on a decree for payment of alimony entered by a Massachusetts court. The court said: "The debt is certain, and it is proved by record; and the decree is, in effect, as much a judg-

[34]Evans *v.* Tatem (Pa. 1823) 9 S. & R. 252.

[35]Tompkins *v.* Cooper (1895) 97 Ga. 631; Warren *v.* McCarthy (1860) 25 Ill. 83; Williams *v.* Preston (1830) 26 Ky. 600; McKim *v.* Odom (1835) 12 Me. 94; Davis *v.* Lipschitz (1902) 96 Mo. App. 587; Kunze *v.* Kunze (1896) 94 Wis. 54; De Longe *v.* Fishback (1913) 153 Wis. 193; Pennington *v.* Gibson (1853) 57 U. S. 65.

[36]See cases in 54 L. R. A. 204; 65 L. R. A. 816, and references there given.

[37](1841) 13 Vt. 231.

ment as if rendered on the common law side of the Court."[38] The case of *Hugh* v. *Higgs*[39] is often cited as a holding to the contrary, but it seems that it is not, as it held that an action at law would not lie upon the "decretal order" of the chancery court, which of course is entirely sound, as a "decretal order" settles nothing finally. There is, however, a dictum in the case denying that an action at law would lie on a decree, but apparently the matter had not been carefully considered. As stated, cases actually involving the question rarely arise, but when they do the decision is nearly always in favor of the action. There are also almost innumerable dicta in favor of allowing the action, the most notable and emphatic being that in *Pennington* v. *Gibson*:[40] "We lay it down, therefore, as the general rule, that in every instance in which an action of debt can be maintained upon a judgment at law for a sum of money awarded by such judgment, the like action can be maintained upon a decree in equity which is for an ascertained and specific amount, and nothing more; and that the record of the proceedings in the one case must be ranked with and responded to as of the same dignity and binding obligation with the record in the other."[41]

If the decree be not for the payment of money, but for the doing of some other act, such as to convey land, we have seen above that as a rule no new action in equity may be brought upon it in the same jurisdiction, apparently for the reason that there is no necessity for permitting it. Wherever there is need, a "bill to execute the decree" is allowed, as we have seen. There remains the question: Can an action, either at law or in equity, be brought upon a foreign decree which is for the doing of anything except the payment of money? Although there is no reason why such actions should not be allowed, if any necessity for them exists, it seems to be supposed by some writers that our system makes no provision for them. One writer says:

"An equitable decree for the doing of an act, except the mere payment of money, is not by our law enforceable in another court, even of the same State; there is no form of proceeding for enforcing the merely personal decree of a court of equity, except by order

[38]Howard *v.* Howard (1818) 15 Mass. 196.

[39](1823) 21 U. S. 697.

[40](1853) 57 U. S. 65.

[41]Ames *v.* Hoy (1859) 12 Cal. 11; Blattner *v.* Frost (1892) 44 Ill. App. 580; McKim *v.* Odom (1835) 12 Me. 94, (semble). The case of Richardson *v.* Jones (Md. 1831) 3 Gill & J. 163, often cited as *contra*, contains only the merest obiter dictum on the question.

of the court rendering it. It is therefore impossible to enforce a foreign decree that an act be done by the defendant, such as making a conveyance, either by decreeing the conveyance without judicial investigation or by regarding it as made. An additional objection to enforcing such a decree is that it is not in its nature the establishment of an obligation, but rather a method of enforcing an obligation, a form of execution."[42]

Other writers, however, express a contrary view.[43] As a matter of fact, the truth seems to lie somewhere between the two statements, *i. e.*, such equitable actions in other jurisdictions may be brought on some though not on all decrees. Looking at the matter aside from authority, is there anything inherent in the nature of a decree of a court of equity for the doing of an act—say the execution of a deed conveying land—which prevents a court of equity in another jurisdiction from holding it to be the equity law of that jurisdiction that the decree of the foreign chancellor gives rise to an equitable cause of action on which a bill for specific performance may be filed? It seems not. An order to pay money and an order to convey land are both in the same form, and one seems to be no more a "merely personal decree" than the other. It is therefore purely a question of positive law whether our system of law has given such legal consequences in equity to foreign decrees for the doing of acts. It seems that in some cases it has and in others it has not. In the case of a decree ordering the conveyance of land, if the decree be entered by the court of equity of the jurisdiction within whose limits the land is situated, there is usually no need to-day for any such relief, as the court may itself vest the title in the plaintiff, if defendant does not comply with the decree. Consequently we must not expect to find many cases in the books. Wherever such relief is necessary, however, it seems to be the law, as far as authorities can be found, that if the decree for the conveyance of land is based upon a contract, express trust, or other consensual relationship of the parties which gives rise, independently of the decree, to equitable interests for the enforcement of which the decree is entered, a bill in equity will lie in other jurisdictions upon the decree itself, if it has not been obeyed, as a substantive cause of action. For example, in *Roblin* v. *Long*,[44] defendant had been ordered by the Chancery

[42] 3 Beale, Cases on Conflict of Laws, 537.

[43] 2 Black, Judgments (2nd ed.) § 872; Hohfeld, 11 Michigan Law Rev. 551. See also the remarks of Holmes, J., in Fall *v.* Eastin (1909) 215 U. S. 1, 14.

[44] (N. Y. 1880) 60 How. Pr. 200.

Court of the Province of Ontario, Canada, to convey to the plaintiff land situated in Ontario. He did not obey and went to New York. An equitable action was brought in New York, the decree and not the original contract being sued on as the cause of action, and a new decree for conveyance was sought. The relief asked for was given, the court assuming that of course the plaintiff was entitled to a new decree. The same result was reached in the Michigan case of *Dunlap* v. *Byers,*[45] although the decree of the Ohio court was for the conveyance of land in Michigan. The instances of such relief are not numerous, probably for the reason suggested above. The principle has, however, often received extra-judicial approval.[46] The case of *Burnley* v. *Stevenson,* cited in the last note, goes indeed much farther than the other cases, by holding that when the defendant, who has disobeyed the foreign chancellor's decree ordering a conveyance of land, brings an ejectment, in the State where the land is, against the previous plaintiff in equity (now defendant at law) the latter may plead the foreign decree as an "equitable defence" under the code of civil procedure. The result of this holding seems to be that the legal effect of the foreign decree and of possession together is to pass legal title, *i. e.,* defendant is in possession and no one has the right or power to disturb him. This is doubtless an extreme view and it would seem better to compel the defendant to plead the foreign decree as an equitable counterclaim, asking for specific performance by way of a new decree.

The case cited to support the proposition that decrees in equity for the conveyance of land are not recognized as having in other jurisdictions the effects stated, is *Bullock* v. *Bullock.*[47] In that

[45](1896) 110 Mich. 109.

[46]Fletcher *v.* Ferrel (1840) 39 Ky. *372, (personal property; relief denied for other reasons); Burnley *v.* Stevenson (1873) 2 Ohio St. 474; Vaught *v.* Meador (1901) 99 Va. 569.

[47](1894) 52 N. J. Eq. 561. The New Jersey court in its opinion gives an argument much like that quoted in the text from Prof. Beale's Summary. If we adopt that view, the result is that in New Jersey, after a decree in New York for specific performance of a contract to convey New Jersey land, a bill must be filed for specific performance of the original contract. At the trial, however, it seems that the determination of the New York Court that the contract was made, etc., could be introduced as "conclusive evidence" of the contract, so that there would be no new investigation into that. The difference between Prof. Beale's view and that urged here would thus be merely a technical one. A question not discussed here is the effect of the full faith and credit clause of the Constitution in requiring States to permit suits on equitable decrees. To discuss that is beyond the scope of this article. The contention is merely that States have permitted such actions on foreign decrees, and that to do so is sound.

case a New York court of equity, after entering a decree of divorce and decreeing alimony, ordered the defendant to execute, by way of security for the payment of the alimony, a mortgage on New Jersey land. He did not do so and this action was brought in the New Jersey chancery court for specific performance of the New York decree. Relief was denied. The chief objection of the court seemed to be based upon the fact that the New York court was attempting by its decree to *create* and not merely to enforce an equitable interest in New Jersey land, there being in existence prior to the decree no such equitable interest. The reasons for and against the view that a New York court has no jurisdiction, *i. e.*, power, to do a thing of this kind have already been set forth in Part II.[48] and need not be repeated here. Probably the view taken by the New Jersey court would be followed by most if not all courts. Even so, the decision has as a decision no bearing upon a case in which all courts recognize that the court of the other State has jurisdiction to make a decree which will be recognized everywhere as binding, *viz.*, where specific enforcement is asked of equitable interests created by the agreements of the parties themselves.[48a]

We are now perhaps ready to consider the truth of the statements which stand as quotations at the opening of this series of articles: "A decree does not bind the right, but only the person to obedience"; "A decree there binds the person to obedience, but does not at all operate upon the matter in question". These statements were made centuries ago. Are they still a part of the law which determines the relations of courts of law and equity to each other? Has there been no evolution? Let us consider cases like that in connection with which these statements were made. A bond is obtained by fraud,[49] or there was to be a consideration which has failed. At common law there was no defense to such an instrument. The chancellor however would enjoin suit upon the instrument and order it delivered up to be cancelled. This was

[48]15 Columbia Law Rev. 128-129.

[48a]It seems to be recognized that a court of equity may enforce a constructive trust growing out of acts of the parties themselves, even though the land is not in the jurisdiction. Butterfield *v.* Butterfield (1905) 9 Ariz. 212. If so, the decree in such a case ought to furnish the basis of a cause of action in another jurisdiction, as in the case of express trusts. No case raising this question has come to the writer's attention.

[49]It is assumed that the one executing the bond knew the character of the instrument he was executing. If he was deceived as to that, it is not his bond, and that may be shown at law under the proper plea.

done in the case in question.[50] Defendant refused to surrender the bond and went to jail for contempt. In the Common Bench, the defendant in equity, as plaintiff, sued on the bond. It was held that the chancery decree was no defense to the action at law. This was in 1459. Is this still the law? Many writers would have us believe that it is. Let us put the case concretely as it might come up to-day. In the federal courts, it is still the law that fraud does not invalidate a sealed obligation in a court of law.[51] Mr. Justice X, sitting as a chancery judge, finds that a bond, or a release of a legal cause of action, was obtained by fraud. He orders the instrument delivered up to be cancelled. Defendant refuses to do so and goes to jail. Defendant instructs his attorney to proceed with the suit on the bond. Would Mr. Justice X, sitting as a common law judge, hold that the bond was still a valid subsisting common law cause of action, so that further equitable relief would be necessary to prevent a recovery; or would he permit the chancery decree to be set up as a defense to the common law action? If it were the case of a release obtained by fraud, would he hold it still a valid release and so a defense to the common law action, or would he hold that the legal effect of his decree as chancellor was to destroy the legal validity of the release and thus to reinstate the common law cause of action?[52]

It is perhaps worthy of note that in Professor Ames's collection of cases on equity, no modern cases following the case of *J. R.* v. *M. P.* are cited. Let us see what we can find. In *Dobson* v. *Pearce*[53] a money judgment at law was obtained in New York. An action of debt was later brought on the New York judgment in a Connecticut court. Thereupon the defendant began a chancery action in Connecticut, alleging fraud in the procuring of the New York judgment. This action in equity resulted in a decree of the Connecticut court of equity declaring that the judgment was

[50] J. R. *v.* M. P. (1459) Y. B. 37 Hen. VI. fol. 13, pl. 3; s. c. Jenk. Cent. Cas. 108, pl. 9.

[51] Vandervelden *v.* Railway Co. (C. C. 1894) 61 Fed. 54; Heck *v.* Missouri Pacific Ry. (C. C. 1906) 147 Fed. 775; Pacific Mutual Life Ins. Co. *v.* Webb (C. C. A. 1907) 157 Fed. 155. The authorities are collected in the opinion in the last case.

[52] Under the new part of Rule 8 of the New Federal Equity Rules, presumably in proper cases the judge would not hesitate to appoint someone to execute a release of the bond in the name of the defendant. Doubtless such a formality would satisfy everyone. The power to do this is not given by statute, however, but only by rule of court; and the rule suggested in the next paragraph of the text is merely a simpler way to do the same thing.

[53] (1854) 12 N. Y. 156.

fraudulently obtained, and perpetually enjoining the prosecution of the action at law. Later this action was brought in New York on the original New York judgment, on the theory that the Connecticut decree in equity did not "operate on the matter in question", *i. e.,* did not affect the validity of the judgment. The New York court held, however, that the Connecticut decree could be set up as a defence to the action at law.[54] If this decision be correct, the result would have been the same if the decree had been made by a New York court of equity. This decision of course was based upon, or at least influenced by, the provisions of the New York Code of Civil Procedure. The effect of it is to give to the adjudication of the court of equity the legal effect of destroying the common law debt based on the judgment. This would not have been true had defendant been required to set the decree up as an equitable counterclaim. Presumably the court which decided *Dobson* v. *Pearce* would hold that execution could not be had on the original judgment, *i. e.,* that the legal effect of the decree was to discharge the judgment or at least the right to execution. To hold otherwise would be inconsistent. The same court would be bound to hold, if fraud were not a defense to an action at law on a specialty, that a decree in equity ordering surrender of the bond for cancellation and perpetually enjoining suit upon it, constituted a valid defence at law to a suit based upon it. While, as stated, the result in *Dobson* v. *Pearce* was influenced by the Code of Civil Procedure, is it not a result that should be reached to-day by all courts? It is a change in substantive law, and in fact the Code contained no authority for it. It has the merit of preserving the advantages of the old system, *viz.,* that principles of equity as to fraud, failure of consideration, etc., are to be administered by the chancellor, which to-day means in most States merely judge without jury, as distinguished from judge with jury. On the other hand, under a modern system of procedure which allows the equitable action for cancellation to be brought by way of counterclaim to the law action, it obtains all the real advantages, without the disadvantages, of supposed simplifications which make the fraud, etc., legal defenses, and thus

[54]The opinion of the court is not as clear as it might be upon the point whether the *decree* has the effect stated, or the fraud has that effect and the decree conclusively establishes the fact of fraud. However, it is not believed that there is any well-considered authority holding that the fraud itself can be set up as a mere defense to an action on a judgment, so that it seems clear the decision has the effect of establishing the rule stated in the text.

compel principles of equity to be administered by a common law tribunal, *i. e.*, by a judge and jury. Such a tribunal is often not adapted to deal effectively either with equitable principles or the kind of facts involved in these controversies; and its decisions are subject to a different kind of appellate review. Would it really be a startling thing if Mr. Justice X, sitting in the federal court of common law, should, even without the aid of a code of civil procedure, rule in accordance with *Dobson* v. *Pearce?* There are apparently no modern precedents to prevent his doing so. As matters are, where in a suit at law in a federal court fraud was set up as matter in confession and avoidance of a release under seal, the court held that while the fraud did not at law in the federal courts have that effect, "if the plaintiff [the one setting up the fraud] so desires, the trial of the law action may be postponed, with leave to the plaintiff to file a bill in equity for the purpose of attacking and testing the validity" of the release.[55] That is, sitting in a common law suit, the judge dispensed for the time being with the necessity for a temporary injunction to stay the proceeding at law.[56] If in the equity proceeding he finds the fraud as alleged and orders cancellation, but does not succeed in getting hold of the physical instrument, shall he refuse in the common law proceeding to give a common sense effect to his adjudication in the equity proceeding?[57]

The well-known case of *Platt* v. *Woodruff*[58] may be supposed to be in conflict with the principle here suggested. In that case an action was brought at law on a negotiable instrument. Certain defenses were set up. The defendant in the law suit then began in another court an action in equity for cancellation of the instrument, asking a temporary injunction. The grounds for relief were substantially the facts relied on in the law suit as a defence.

[55]Vandervelden *v.* Railway Co. (C. C. 1894) 61 Fed. 54.

[56]This, of course, is always the effect in a similar case of an equitable counterclaim under code procedure. It acts automatically to stop the action at law until the counterclaim has been disposed of.

[57]The case of Burnley *v.* Stevenson (1873) 24 Oh. St. 474, discussed above in the text, is another code decision following the principle of Dobson *v.* Pearce. The equitable decree for conveyance was there allowed not as an equitable counterclaim but as a *defense* to an ejectment. This gives to the decree the effect of depriving the plaintiff at law of his right to recover possession; and so of his legal title. Other cases which at least indicate the probability that Dobson *v.* Pearce would be followed are: Chouteau *v.* Gibson (1882) 76 Mo. 38; Preston *v.* Rickets (1886) 91 Mo. 320; Sampson *v.* Mitchell (1894) 125 Mo. 217.

[58](1875) 61 N. Y. 378.

A temporary injunction was granted and later vacated as irregularly granted. Later another temporary injunction was obtained from another judge restraining the plaintiff at law from prosecuting his suit. The plaintiff at law disobeyed the injunction, and after a trial obtained a judgment. Later the second temporary injunction was vacated as irregularly granted. The action in equity now came on for a hearing. A referee held the judgment at law void. This was correctly held erroneous. When the judgment was entered, there was no final decree in the case, purporting to be based upon a determination of the rights of the parties. The temporary injunction could therefore be nothing more than an order personally binding the party enjoined. It did not divest the common law court of jurisdiction, *i. e.,* power to act and enter a judgment. Further, it was not called to the attention of the common law court in any way. The common law court, having jurisdiction, heard the case and entered judgment. On the principles set forth above concerning the doctrine of *res judicata,* if the facts alleged as a defence at law were the same facts that formed the basis of the equitable action for cancellation, as might well be the case, the adjudication at law settled the matter and the plaintiff in the equitable action could not litigate it again.[59] Let us note also that it is not contended that the decree of the court of equity in *Dobson* v. *Pearce* deprived the court of law of any jurisdiction, *i. e.,* power to act. If the principle contended for here should be adopted, it would not follow that a judgment of a trial court refusing to recognize the decree as having the legal effect suggested would be void. It would most certainly be valid and binding until reversed, though erroneous and liable to be reversed by an appellate tribunal which accepted the principle of *Dobson* v. *Pearce.* It would merely be the case of a court having jurisdiction making an error as to the law to be applied to the state of facts before it. From whatever point of view the matter be approached, the decision in *Platt* v. *Woodruff* is sound and entirely consistent with *Dobson* v. *Pearce.*

There is one other well established rule which may at first sight seem inconsistent with the rule laid down in *Dobson* v. *Pearce.* The reference is to cases like *Winston* v. *Westfeldt,*[60] in which a court of equity ordered a negotiable instrument deliv-

[59]This is because often the same facts may constitute a defense at law to a contract or note, and also constitute the basis of an equitable suit for cancellation, at least if no lawsuit has been brought.

[60](1853) 22 Ala. 760; 1 Ames, Cases in Equity Jurisdiction, 3.

ered up for cancellation. Instead of doing so, the defendant negotiated it to a holder in due course. It was held that the latter could enforce it, the negotiation having been before maturity. It may be argued that this result shows that the decree for cancellation has not the legal effects herein ascribed to it. This, however, turns out upon analysis to be a superficial view. In order to have the power to vest an indefeasible title in a holder in due course, it is not necessary that the one negotiating the instrument have any real title to it, *i. e.,* any right to recover on it himself. A thief who steals a negotiable instrument payable to bearer certainly has no right to recover on it himself, that is, the maker (if, for example, it be a promissory note) is under no duty to pay the thief, but in spite of this the latter is, on grounds of policy, given the power to do acts which result in giving one who buys in good faith and for value an indefeasible right. Recurring to our analysis as presented in Part I, the thief has no true right against the maker, (*i. e.,* the maker owes him no duty to pay) and no privilege (*i. e.,* he is under a duty to the payee not) to negotiate the note; but he does have a power to negotiate it to a holder in due course. The same may be said of the note in the principal case after the decree in equity for cancellation is entered. While in the hands of the defendant, it is not a valid note; the defendant has not a true right against the maker; and that he has not is conclusively settled by the decree in equity;[61] but he has, on grounds of policy, a power to vest true rights, etc., in a holder in due course. These cases are therefore not authorities for a view contrary to that suggested. In fact, it is extremely difficult to find any modern case in which the decision really involves a principle inconsistent with that established for New York by *Dobson* v. *Pearce.* In closing it may be pointed out that this common sense rule is entirely analogous to the statutory power *in rem* conferred upon courts of equity to vest title to land by their decrees. May we not believe that in the case of judgments obtained by fraud, and of specialties in jurisdictions where "equitable defences" are not allowed, this development, giving to the decree of the chancellor an effect *in rem* upon the legal right involved, has already taken place in the evolution of our legal system? Is it too much to

[61]In the case of the negotiable note, the fraud is a defense to an action at law prior to the decree for cancellation; consequently the case differs from that of the sealed instrument. Even so, it seems it is the decree for cancellation which now constitutes a good plea in confession and avoidance, whereas before the decree the fraud itself was the defense.

expect that common sense rather than an outworn phrase shall in the future govern the relations of the two co-ordinate parts of our legal system?[62]

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[62]The writer wishes to acknowledge his indebtedness to Prof. W. N. Hohfeld of Yale University, with whom he has discussed, in conversations scattered over a number of years, the leading points of this series of articles. Many valuable suggestions were derived from these conversations, as well as from the articles referred to in the notes. Acknowledgment is also due to the writer's colleagues on the University of Chicago faculty, for valuable criticism and suggestions. It is perhaps needless to add that none of these are responsible for the detailed treatment here given.

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NOTES.

WASTE COMMITTED BY STRANGER.—In the recent case of *Rogers* v. *Atlantic, Gulf & Pacific Co.* (1915) 213 N. Y. 246, a life tenant sued for the defendant's negligence in setting fire to the premises. The plaintiff argued that since he was responsible to the remainderman for the defendant's wrongful act, he should recover not only for the injury to his life estate, but also for the damage to the inheritance. The court rejected this argument, but held, on other grounds, that he was entitled to all the damages claimed. The decision involves two questions: (1) is a tenant for life or years liable for waste committed by a stranger; and (2) what damages can he recover from such a stranger?

It is frequently said that under the old common law, tenants in dower and by curtesy were liable for waste, but tenants for life or

years were not;[1] the distinction being that the estates of the former were created by the law, which therefore gave a remedy against them, whereas the interests of the latter were created by the owner in fee, who should have reserved a remedy. Since the Statute of Marlbridge and the Statute of Gloucester, however, enacted in 1267 and 1278 respectively, it is certain that tenants for life and years have been punishable for waste,[2] and the only difficult question has been to determine what injuries to the inheritance constitute waste. That they are responsible for voluntary acts of destruction committed by themselves, or their agents, goes without saying. Furthermore, they were formerly liable for any deterioration in the premises due to decay, neglect, accident, or, despite the assertion in the principal case to the contrary, even for the wilful or negligent wrongdoing of a stranger.[3] In fact, the tenant was a virtual insurer of the lands intrusted to him, save against the act of God and the public enemy. His position was analogous to that of the common carrier and the innkeeper, and for similar reasons of public policy.[4] But his situation was destined to improve. The Statute of 6 Anne, c. 31, removed the severe penalties of the common law against persons on whose property a fire started; it gradually became recognized that tenants were liable only for such waste as resulted from their own default;[5] and to-day, it has come to be doubted whether they are liable at all for permissive waste.[6] Nevertheless, the idea is still widespread, and is supported by decisions, that injuries resulting from the wrongdoing of a stranger constitute waste,[7] despite the fact that the reasons for this unjust rule have long since disappeared,[8] and that it is inconsistent with the more lenient doctrines of to-day.

As regards the tenant's rights against the wrongdoer, it is well

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[1]See Green *v* Cole (1671) 2 Saund. 252, note 7; Moore *v.* Townshend (1869) 33 N. J. L. 284, 300; but see article by Prof. G. W. Kirchwey, in 8 Columbia Law Rev., 425.

[2]See Sampson *v.* Grogan (1899) 21 R. I. 174.

[3]Prof. Kirchwey, 8 Columbia Law Rev., 435-437.

[4]See Attersoll *v.* Stevens (1808) 1 Taunt. *183, *196.

[5]Sampson *v.* Grogan, *supra*; Earle *v.* Arbogast & Bastion (1897) 180 Pa. 409; Prof. Kirchwey, 8 Columbia Law Rev., 623-627.

[6]Not liable, *In re* Cartwright (1889) L. R. 41 Ch. Div. 532; *contra,* Moore *v.* Townshend, *supra.* See Williams, Real Property (22nd ed.) 520, note; Prof. Kirchwey, 8 Columbia Law Rev., 631-635.

[7]Mason *v.* Stiles (1855) 21 Mo. 374; Fay *v.* Brewer (Mass. 1825) 3 Pick. 203; Powell *v.* Dayton, etc. R. R. (1888) 16 Ore. 33; Consolidated Coal Co. *v.* Savitz (1894) 57 Ill. App. 659; see White *v.* Wagner (Md. 1818) 4 Har. & J. 373; Baker *v.* Hart (1890) 123 N. Y. 470, 473.

[8]Coke's reason, that otherwise the reversioner would be without redress as the outstanding leasehold barred his right to sue the stranger, is without force to-day now that the restriction on the reversioner's right to sue has been removed. See Rupel *v.* Ohio Oil Co. (1911) 176 Ind. 4, 10; 4 Sutherland, Damages (3rd ed.) § 1012. And the other reason, that the tenant, being on the premises, was presumed to know of and collude in the act of the stranger, whereas the landlord might not discover the injury until too late to punish the wrongdoer, see Attersoll *v.* Stevens, *supra,* *202, loses its weight in these more settled times. Furthermore, where the stranger burns a building, the principal case points out that to hold the tenant responsible violates the present rule exempting him from liability for fire not caused by his default.

settled that he can recover for all injuries to his possession, and that the landlord has a separate right of action for the injury to the inheritance.[9] But is there any theory on which the tenant can recover all these damages in one suit? In allowing such recovery, the courts usually go on the ground that the wrongdoer's act has rendered the tenant liable to the landlord for waste.[10] The existence of such liability is denied in the principal case, but we see that it has been enforced at times despite its injustice, and that it is the usual ground for recovery is evidenced by cases which deny recovery to tenants who are not so liable, such as tenants at will.[11] If this theory be logically carried out, it is evident that the tenant's right to damages for injury to the inheritance does not accrue until his liability to the reversioner has been enforced, and the extent of his injury ascertained. His position is analogous to that of a surety; and just as the surety's right to indemnity does not accrue until his liability for his principal's debt has been enforced, so the tenant's right should not accrue until his liability has likewise been enforced.[12] Most courts have overlooked this fact, and have relied on arguments of convenience alone in deciding the question. On the one hand, it is argued that to give this right to the tenant practically deprives the landlord of his remedy against the wrongdoer, and leaves him only his remedy against the tenant, who may be irresponsible, since a recovery by an insolvent tenant will bar the landlord's right, and so will the defeat of the tenant's action by a defense which would not have been good against the reversioner.[13] On the other hand, it is argued that the contrary rule may render the tenant's cause of action against the wrongdoer ineffective through delay, where the remainderman is an infant, or contingent and not yet ascertained, or where he delays in enforcing the tenant's liability.[14] The principal case manages to allow a recovery of the entire damages by the tenant, and yet avoid all of the above difficulties, by rejecting the whole doctrine that tenants are liable for the acts of strangers, and by drawing an analogy from the law of bailments, which permits a bailee, though not liable to the bailor, to recover from a third party who wrongfully injures the subject of bailment. What the bailee recovers, he holds as trustee for the bailor; and his recovery bars an action by the bailor. The analogy between a tenant and a bailee has been noticed before,[15] and the only fault to be found with it is the historical fact that the tenant's right really arose out of his liability to the reversioner, whereas the bailee's right is said to find its origin in the importance imputed in early times to the fact of possession.[16]

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[9]See Rupel *v.* Ohio Oil Co., *supra*; 4 Sutherland, Damages (3rd ed.) § 1012.

[10]See Austin *v.* Hudson River R. R. (1862) 25 N. Y. 334; Cargill *v.* Sewall (1841) 19 Me. 288; Moeckel *v.* Cross & Co. (1906) 190 Mass. 280.

[11]Coale *v.* Hannibal etc. R. R. (1875) 60 Mo. 227. 233. A tenant at will is liable for voluntary, but not for permissive, waste. Harnett *v.* Maitland (1847) 16 M. & W. 256; Lothrop *v.* Thayer (1885) 138 Mass. 466.

[12]California Dry-Dock Co. *v.* Armstrong (C. C. 1883) 17 Fed. 216.

[13]See Wood *v.* Griffin (1865) 46 N. H. 230; Nashville, etc. R. R. *v.* Heikens (1903) 112 Tenn. 378.

[14]Dix *v.* Jaquay (N. Y. 1904) 94 App. Div. 554.

[15]See Anthony *v.* New York etc. R. R. (1894) 162 Mass. 60, 65.

[16]2 Tiffany, Landlord & Tenant, 2105; Holmes, Common Law, 166.

But there is eminent authority for the view that the bailee's right also depended originally on a liability to the bailor which has since disappeared;[17] and if this be true, the analogy between the tenant and bailee is perfect.

RENTS, PROFITS AND INTEREST IN SPECIFIC PERFORMANCE.—The sealing of a contract for the sale of land is sometimes said to work a conversion so as to pass the equitable title to the vendee, vesting in the vendor the ownership in equity of the purchase money.[1] The inaccuracy of such a statement is evident from the fact, among others, that intermediate the making of the contract and the date for performance, the rents, issues, and profits, go to the vendor.[2] If the conversion occurred by virtue of the sealing of the contract, the vendee, having the equitable title to the land, seems entitled to the rents and profits, and the vendor should have interest on the purchase money. But although land has always been considered the proper subject of a trust, courts have never gone to the extent of treating purchase money as a *res*.[3] As a matter of fact, therefore, the vendor does not own the purchase money either in law or in equity, and is not entitled to interest until after the date for performance;[4] and, on the theory that it would be most inequitable to allow the vendee not only the interest on his money, but also the rents and profits of the land, the vendor may retain the rents and profits until the time for performance.[5]

After the date for performance, or after performance, the rights of the parties are reversed. Inasmuch as equity will not permit the vendor to profit by his own default, the vendee becomes entitled to the rents and profits of the land after the date for performance,[6] and

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[17] 2 Pollock & Maitland, History of English Law, 170-172.

[1] Seton *v.* Slade (1802) 7 Ves. Jr. *265, *274; Lysaght *v.* Edwards (1876) L. R. 2 Ch. Div. 499, 507.

[2] Lumsden *v.* Fraser (1841) 12 Sim. 263. For a discussion of the incidents and a criticism of the theory of equitable conversion, see article by Prof. H. F. Stone entitled "Equitable Conversion by Contract". 13 Columbia Law Rev., 369.

[3] The right of the vendor to specific performance has been said to rest on some theory of mutuality; but it is really based on the equitable rights and obligations of the parties. The vendor holds the property as security for the purchase price, somewhat as a mortgagee, and as he is subject to similar restrictions and liabilities, he is given corresponding rights. As equity does not consider time of the essence, it allows specific performance by the vendee after the date for performance. In order to give the vendor power to cut off this right, he may bring his bill for specific performance, which is analogous to the mortgagee's bill for foreclosure. J. B. Ames, 3 Columbia Law Rev., 1, 12. His right has never been based on the theory that he was enforcing a trust. See Jones *v.* Newhall (1874) 115 Mass. 244.

[4] Minard *v.* Beans (1870) 64 Pa. 411.

[5] Lumsden *v.* Fraser, *supra*.

[6] Phillips *v.* Sylvester (1872) L. R. 8 Ch. App. 173; see Davy *v.* Barber (1742) 2 Atk. *489; Bostwick *v.* Beach (1886) 103 N. Y. 414, 423. If the vendor resumes possession of the premises, he must pay an occupation rent to the vendee; Peck *v.* Ashurst (1895) 108 Ala. 429; likewise, if he retains possession; Dyer *v.* Hargrave (1805) 10 Ves. Jr. *505; but not where the vendee is wilfully in default. Leggott *v.* Metropolitan Ry.

must pay interest on the unpaid purchase price.[7] The same result is reached where the contract has not been performed. If in the first case, however, as frequently happens, the rents and profits of the land amount to less than the interest on the purchase money, the vendee may retain the interest by allowing the vendor the rents.[8] Should the contract contain no provision for the date of taking possession, the vendee owes interest only from the time possession is taken,[9] or from the time the condition of the title is such that possession can reasonably be taken.[10] Where the delay in transferring title is caused by the vendor, but without his active fault, the vendee must pay interest if he is in possession, or has received rents. It also seems that an inexcusable refusal on the part of the vendor to convey title, or to receive the purchase money, deprives him of all claim to interest.[11] Where the contract contains a provision that interest shall be payable from a certain date, even though "from any cause whatever" the purchase money shall not then be paid, it is well settled that unless the vendor wilfully defaults, mere inability on his part to perform will not prevent the running of interest from the date set.[12] It is universally held that where the vendee is not in possession, he is under no obligation to pay interest until the seller is able to convey a good title.[13]

In the recent case of *Wilson* v. *Seybold* (D. C. W. Va. 1914) 216 Fed. 975, an option for the sale of land was accepted in May, 1906. In March, 1912, the vendor, after years of litigation, was finally awarded title to the property by a judicial decision, and in May, 1913, the vendee paid the purchase price into court and notified the vendor of the fact. In a suit for specific performance by the seller, it was held

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(1870) L. R. 5 Ch. App. 716. The vendee, however, is entitled to dividends on stock contracted to be sold. Currie *v.* White (1871) 45 N. Y. 822; Black *v.* Homersham (1878) L. R. 2 Exch. Div. 24; see Phinizy *v.* Murray (1889) 83 Ga. 747.

[7]McKay *v.* Melvin (N. C. 1840) 1 Ired. Eq. 73; Minard *v.* Beans, *supra*; see Davy *v.* Barber, *supra*. The same rule applies where the vendee brings an action for, and recovers, rents. Covell *v.* Cole (1867) 16 Mich. 223. But where the purchase price is payable only on delivery of the deed, unless that condition is complied with, or the vendee is given possession of the land, there is no obligation to pay interest. Armstrong *v.* Maryland Coal Co. (1910) 67 W. Va. 589. The vendee, however, must pay taxes accruing after he has entered into possession. Miller *v.* Corey (1863) 15 Ia. 166; Anderson *v.* Harwood (1892) 47 Mo. App. 660.

[8]Dias *v.* Glover (N. Y. 1839) 1 Hoff. Ch. *71; Worrall *v.* Munn (1873) 53 N. Y. 185; see Esdaile *v.* Stephenson (1822) 1 S. & S. 122.

[9]Fludyer *v.* Cocker (1806) 12 Ves. Jr. *25; Cleveland *v.* Burrill (N. Y. 1857) 25 Barb. 532.

[10]See Binks *v.* Lord Rokeby (1818) 2 Sw. 222.

[11]Hart *v.* Brand (Ky. 1818) 1 A. K. Marsh. *159; King *v.* Ruckman (1873) 24 N. J. Eq. 556; Atchison, T. & S. F. R. R. *v.* Chicago & W. I. R. R. (1896) 162 Ill. 632. In such a case, the vendor must reimburse the vendee for any damages or waste to the land subsequent to the making of the contract. Phillips *v.* Sylvester, *supra*; Worrall *v.* Munn, *supra*.

[12]Cowpe *v.* Bakewell (1851) 13 Beav. 421; Vickers *v.* Hand (1859) 26 Beav. 630. The vendee cannot claim the rents and profits where he is excused from paying interest because of the vendor's wilful default. Hayes *v.* Elmsley (1893) 23 Can. S. C. 623.

[13]Lombard *v.* Chicago Sinai Congregation (1874) 75 Ill. 271; see Grove *v.* Bastard (1851) 1 DeG. M. & G. *69; *cf.* Carrodus *v.* Sharp (1855) 20 Beav. 56.

that the purchaser must pay interest on the purchase price from March, 1912, until May, 1913. The decision is obviously correct. The vendee, by a definitive appropriation of the purchase price, with notice to the vendor, may stop the running of interest.[14] But there was a period between the two dates when the vendor was in a position to convey title to the property, and according to the rules above outlined, the vendee should be obliged to pay interest for that interval. Although the case did not decide the point, it seems, also, that the vendee is entitled to the rents and profits of the land during that period.

Admissibility of Extrinsic Evidence to Establish an Instrument as a Will.—The courts are frequently called upon to determine whether a certain instrument is to operate as a testamentary disposition of the maker's property. The law has made no particular form or technical language requisite to the validity of a will,[1] and although a writing purports on its face to be an assignment, a letter, or a deed, it may nevertheless be effective as a will.[2] The particular name given to it by the maker, or his belief as to its character, while evidence of his intention, are not in themselves conclusive. The fundamental test in each case is the intention of the maker with reference to the effect the instrument should have. Did he intend that it should operate to convey a present, irrevocable interest, or was it to pass no interest until after his death? If the latter, it is his will regardless of its form, and effective as such, if executed in the manner required by the Statute of Wills.[3] The question then arises as to how the court, in a given case, is to ascertain the intention of the maker. It may be definitely expressed by the terms of the instrument; or, as often happens, it may be doubtful from the form of the writing, or from the expressions employed, whether it was intended to have a present or a posthumous effect. In the latter case, the authorities are in accord in admitting extrinsic evidence to aid the court in finding the true intention.[4]

Cases often arise, however, where no indication whatever as to the maker's intention is apparent, except from the form of the instrument. For example, a writing in form a will, and properly executed

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[14]Dyson *v.* Hornby (1851) 4 DeG. & Sm. 481; Bostwick *v.* Beach, *supra*; see Steenrod *v.* Wheeling etc. R. R. (1885) 27 W. Va. 1. It has been intimated that a notice of rescission of the contract has the same effect. See Rutledge *v.* Smith (S. C. 1826) 1 McC. Ch. 399. The money so appropriated, however, does not belong to the vendor, and any gain or loss is the vendee's. Roberts *v.* Massey (1807) 13 Ves. Jr. *561. Where the contract provides for the payment of interest from the date set for performance, an appropriation of the purchase money, even though with notice to the vendor, will not stop the running of interest. *In re* Riley (1886) L. R. 34 Ch. Div. 386.

[1]Gardner, Wills, § 31.

[2]Robinson *v.* Brewster (1892) 140 Ill. 649, 659; Barney *v.* Hays (1892) 11 Mont. 571; Jordan *v.* Jordan's Admr. (1880) 65 Ala. 301; Sperber *v.* Balster (1881) 66 Ga. 317. If the instrument passes an interest *in praesenti*, though the right of enjoyment be postponed until the death of the maker, it is nevertheless a deed. Lauck *v.* Logan (1898) 45 W. Va. 251.

[3]Schouler, Wills, §§ 265, 272.

[4]Robertson *v.* Dunn (1812) 6 N. C. 133; Kelleher *v.* Kernan (1883) 60 Md. 440; Sharp *v.* Hall (1888) 86 Ala. 10.

as such, may have been made with no intention that it should so operate; or, conversely, an instrument may contain none of the features of a will, nor any words from which the real intention of the maker that it should be his testament may be inferred. The recent case of *Maris* v. *Adams* (Tex. 1914) 166 S. W. 475, is an illustration of the latter class. The proponent offered for probate an envelope and two enclosed papers as the last will and testament of the deceased. No testamentary intent was disclosed by the papers themselves, but parol evidence was offered to show that the deceased intended them to operate as his will. This evidence was held by a majority of the court to be inadmissible.[5]

The authorities are by no means in accord upon the question presented. The English, and some American authorities, admit the evidence both to prove that the writing was intended to be a will,[6] or though purporting to be a will, that it was executed without an *animus testandi*.[7] On the other hand, several recent cases have excluded extrinsic evidence to prove intent where nothing appears in the writing indicating a testamentary character;[8] and others, presuming conclusively an *animus testandi* from the fact of due execution, do not permit its non-existence to be shown.[9] The objection is generally offered that to admit extrinsic evidence would be to change the legal effect of the instrument, to "vary, contradict, or add to", its terms.[10] It is settled, however, that evidence tending to show that an instrument never in fact had a legal existence is not within this objection; for example, extrinsic evidence is admitted in the case of a writing which purports to be a valid contract to show that some condition precedent to the inception of the obligation has not been performed.[11] The evidence offered to show the lack of intent is admitted, therefore, to show that the instrument is not in fact a will.[12] It is contended that the parol testimony showing that the writing was intended as a will, is not offered to contradict the language of the instrument, but to determine the legal effect the maker intended it to have—whether to pass a present interest, or to have a posthumous effect only—or, in other words, to determine the time when it was intended to become operative.[13] It is more difficult, however, to show that this case is not within the general objection mentioned above, for to

[5]The papers in the principal case could not have operated as a will in any event, since not subscribed and attested as required by the statute; nor as a holographic will, because not wholly in the handwriting of the deceased.

[6]King's Proctor *v.* Daines (1830) 3 Hagg. 218; Jones *v.* Nicolay (1850) 2 Robertson 288; Wareham *v.* Sellers (Md. 1837) 9 Gill. & J. 98; Clark *v.* Ransom (1875) 50 Cal. 595; see Kisecker's Estate (1899) 190 Pa. 476.

[7]Nichols *v.* Nichols (1814) 2 Phillimore 180; Lister *v.* Smith (1863) 3 Sw. & Tr. 282; Fleming *v.* Morrison (1904) 187 Mass. 120.

[8]Clay *v.* Layton (1903) 134 Mich. 317; Noble *v.* Fickes (1907) 230 Ill. 594.

[9]*In re* Kennedy's Estate (1910) 159 Mich. 548; Brown *v.* Avery (1912) 63 Fla. 355.

[10]As to the admissibility of parol evidence to explain the terms of a will, see 11 Columbia Law Rev., 670.

[11]Pym *v.* Campbell (1856) 6 E. & B. 370.

[12]See Davis *v.* Rogers (1855) 6 Del. 44, 92.

[13]*Cf.* dissenting opinion in Noble *v.* Fickes, *supra*.

allow the real intention to be shown would, in effect, give validity to a writing as a will in spite of its terms which unambiguously assert that it is something else; while in the other case, the effect is not to give validity to the instrument as something else, but merely to show that it is not what it purports to be.

It is obvious that if extrinsic evidence is excluded in these cases, the real intention of the testator may, in some instances, be defeated.[14] In the one case, the deceased is declared intestate although the instrument was intended as his will, and in the other, an instrument though not executed with testamentary intent, is given effect as a will, contrary to the intention of the maker. It is likewise obvious that to admit extrinsic evidence might often result in the defeat of the maker's intention by fraudulent testimony. Its admission tends to subject all wills to the parol story that the testator did not mean what he said; or to make a will for the deceased where none was intended. The cases admitting it are careful to observe that the *prima facie* meaning may be shown not to be the real meaning only by the most clear and cogent proof.[15] The Statute of Wills affords an instance where certain requirements, though sometimes defeating intention and working hardship, are considered necessary for the prevention of fraud; and, having due regard for the case where the instrument is ambiguous, the exclusion of extrinsic evidence in the cases under discussion may be deemed salutary in safeguarding the intention of the testator.[16]

Right of a Homicide to Acquire Property as a Result of His Crime.—The question as to whether a person who has slain another may profit by the death of his victim, has not often been raised for determination in courts of last resort. It is an interesting question, however, and especially so in view of the comparative frequency of its appearance in recent years. Broadly speaking, there are three classes of cases in which this point presents itself for consideration: (1) where the beneficiary of an insurance policy has killed the insured, and seeks to collect the insurance; (2) where one who is a devisee has slain his testator, and subsequently claims the devise; (3) where the slayer of an intestate seeks, either at common law or under some statute of descent and distribution, to share in the estate of the deceased. Of course, the action is usually not brought by the murderer himself, but by someone claiming under him as assignee, heir or personal representative. The rights to be considered, however, are those of the criminal, barring the exceptional case of an assignee who is an innocent purchaser for value.

In the two earliest cases discussing this question, in England and the United States, the murderer had secured insurance upon the life of his victim with the intention of precipitating the latter's death and collecting the value of the policy.[1] It was held in each case that the policy was void, as it had been obtained with intent to defraud;

[14]Dodson *v.* Dodson (1905) 142 Mich. 586; Clay *v.* Layton, *supra.*

[15]See Lister *v.* Smith, *supra.*

[16]See note entitled "The Admissibility of a Testator's Declaration Disclosing Intention", 10 Columbia Law Rev., 469.

[1]The Prince of Wales, etc. Assn. Co. *v.* Palmer (1858) 25 Beav. 605; New York Mutual Life Ins. Co. *v.* Armstrong (1886) 117 U. S. 591.

but the American court added that mere proof that the beneficiary had caused the death of the assured by felonious means was sufficient to defeat a recovery by him on the policy, as to permit recovery would be like permitting recovery of insurance on a building which the beneficiary of the policy had feloniously burned. This dictum of the Supreme Court is now settled law, both in this country and in England.[2] The denial of payment in these cases is based upon the doctrine that it is against public policy to permit a person to benefit by his criminal act;[3] it is not an added punishment to that prescribed by law for the homicide, but merely a condition implied by law in the interpretation of the contract of insurance.[4] In order to defeat recovery by the beneficiary, it is not necessary to show that the purpose of the killing was to obtain the proceeds of the policy; all that is needed is proof that the act was intentional.[5] It is recognized, however, that this rule of public policy, which prevents a murderer, or one claiming under him, from benefiting by his criminal act, ought not to be extended further than is absolutely necessary for the protection of public interests.[6] So the insurer will not be exempted from liability on the policy, where a resulting trust can be declared in favor of the deceased's estate,[7] or in favor of those who are next entitled to take upon disqualification of the primary beneficiary.[8]

A similar rule is applied by the courts in cases of the devolution of property by devise. It has been held that a devisee cannot take under the will of a testator whose death has been caused by the felonious act of the devisee himself.[9] In applying this rule, the court of last appeal just cited, held that no distinction could be made between a death caused by murder and one caused by manslaughter. It is submitted, however, that this is an extreme view, which should not be generally accepted, as in many cases of manslaughter the element of intent is wholly lacking, and it would be most harsh to cut off the rights of a devisee who had accidentally killed his testator.[10] As in the insurance cases, this doctrine should be cautiously applied and limited to the immediate requirements of public safety and morality. The fact that the beneficiary under a will caused the death of the testator by felonious means does not invalidate the devise, and,

[2]Schmidt *v.* Northern Life Assn. (1900) 112 Iowa 41; Knights of Honor *v.* Menkhausen (1904) 209 Ill. 277; see Cleaver *v.* Mutual Reserve Fund Life Assn., L. R. [1892] 1 Q. B. 147.

[3]See Cleaver *v.* Mutual Reserve Fund Life Assn., *supra.*

[4]See Schreiner *v.* High Court, etc. (1890) 35 Ill. App. 576.

[5]See Schreiner *v.* High Court, etc., *supra.* Thus the beneficiary's claim is not barred where he was insane at the time of the murder; Holdom *v.* Ancient Order, etc. (1896) 159 Ill. 619, reversing s. c. (1894) 51 Ill. App. 200; though an insurance company can protect itself against this contingency by an express stipulation in the policy. See 14 Columbia Law Rev., 172.

[6]See Cleaver *v.* Mutual Reserve Fund Life Assn., *supra,* p. 151.

[7]See Cleaver *v.* Mutual Reserve Fund Life Assn., *supra*; Schmidt *v.* Northern Life Assn., *supra*; *cf.* New York Life Ins. Co. *v.* Davis (1899) 96 Va. 737.

[8]Knights of Honor *v.* Menkhausen, *supra.*

[9]Lundy *v.* Lundy (1895) 24 Can. Sup. Ct. 650, reversing McKinnon *v.* Lundy (1894) 21 Ont. App. 560, which reversed s. c. (1893) 24 Ont. Rep. 132.

[10]See McKinnon *v.* Lundy (1894) 21 Ont. App. 560.

according to New York decisions, the only relief which can be obtained against the beneficiary is equitable and injunctive, by way of preventing the enforcement of his legal rights.[11] The criminal, therefore, receives the legal title, but equity, acting *in personam,* will declare him a trustee *ex maleficio* for the benefit of those who are entitled to the property as a result of his disqualification, and will deprive him of the fruits of his iniquity.[12]

Where a husband murders his wife, or an heir his ancestor, the common law rules of survivorship and succession will not operate in favor of the felon.[13] The common law maxim that no one shall be permitted to profit by his iniquity, overrides the ordinary principles of descent and distribution. A very different question arises, however, where the devolution of the intestate's property is governed by some positive statutory provision. Contracts of insurance, and wills, may be interpreted in the light of public policy, principles of the common law are subject to exceptions based upon its fundamental maxims, but where the legislature has provided, in plain and unambiguous language, rules for the descent and distribution of an intestate's estate, there is no room for construction and interpretation, and the property must descend to the persons designated by the statute.[14] Neither law nor equity may interfere to take the property from the murderer and give it to another, for such action would amount to the addition of an exception or limitation to a statute, absolute and peremptory in its terms, and would constitute a usurpation of legislative functions by the judiciary.[15] This principle of statutory construction is clearly and forcefully enunciated in the recent case of *Wall* v. *Pfanschmidt* (Ill. 1914) 106 N. E. 785. The dictum asserted in *Riggs* v. *Palmer,*[16] that the operation not only of contracts, but even of laws, is to be controlled by the maxims of the common law, has been, therefore, either rejected or greatly confined in its application.[17] Even the New York courts now tend to limit the effect of this decision more and more, as is shown in the recent case of *In re Wolf* (Sur. Ct., N. Y. County, 1914) 150 N. Y. Supp. 738.[18] The only proper way to avoid

[11]See Ellerson *v.* Westcott (1896) 148 N. Y. 149, reversing s. c. (N. Y. 1895) 88 Hun 389. This case limits the earlier decision of Riggs *v.* Palmer (1889) 115 N. Y. 506.

[12]This view is explained and approved by Professor Ames in his Lectures on Legal History, pp. 310-322.

[13]See Box *v.* Lanier (1903) 112 Tenn. 393; 4 Columbia Law Rev., 513.

[14]Owens *v.* Owens (1888) 100 N. C. 240; Deem *v.* Millikin (1892) 6 Ohio C. C. 357, affirmed without opinion (1895) 53 Ohio St. 668; Shellenberger *v.* Ransom (1894) 41 Neb. 631, reversing s. c. (1891) 31 Neb. 61; Carpenter's Estate (1895) 170 Pa. 203; Kuhn *v.* Kuhn (1904) 125 Iowa 449; Gollnik *v.* Mengel (1910) 112 Minn. 349; McAllister *v.* Fair (1906) 72 Kan. 533; Holloway *v.* McCormick (1913) 41 Okla. 1; Hill *v.* Noland (Tex. Civ. App. 1912) 149 S. W. 288. The only decision *contra* is Perry *v.* Strawbridge (1907) 209 Mo. 621, in which the court admits that the authority is all the other way.

[15]*Cf.* Bosley *v.* Mattingly (Ky. 1853) 14 B. Monr. 89; United States *v.* Fisher (1805) 2 Cranch 358, 399.

[16]*Supra.*

[17]See Wharton, Homicide (3rd ed.) § 667.

[18]In this case it was held that a man who had killed his wife, while intending to kill her paramour, ought not to be barred from sharing in her estate under the Statute of Distributions, "because he had not the slightest intention of killing his wife and profiting by her death."

the undesirable result of allowing murderers to share in the distribution of the estates of their victims, is to cause the legislatures of our several States to enact carefully worded statutes, establishing exceptions to our present laws of descent and distribution in this class of cases.[19]

Prohibition of Employment of Aliens in Construction of Public Works.—The power of the legislature to protect the health, morals, and safety of the public, has been extended by a liberal interpretation of these terms to cover any provision, by reasonable means, for the general welfare.[1] As the exercise of the police power is subject to the Fourteenth Amendment,[2] however, no statute may be justified under the police power which arbitrarily infringes property rights or personal liberty, or which makes any unreasonable discrimination.[3] The question has been raised in the recent case of *People* v. *Crane* (App. Div., 1st Dept., 1914) 150 N. Y. Supp. 933,[4] whether a statute prohibiting the employment of aliens in the construction of public works is a reasonable exercise of the police power. Statutes have been upheld prohibiting aliens from killing wild birds or animals, or carrying shotguns,[5] or from obtaining licenses for selling liquor,[6] or peddling.[7] In all these cases, however, there is a clear connection between the discrimination and the public welfare; but in the present statute, the connection is not so apparent. The public works would not be any better built, since aliens are as well fitted as citizens of the United

[19]For examples of statutes applicable to this class of cases, see Kuhn *v.* Kuhn, *supra*; *In re* Kirby's Estate (1912) 162 Cal. 91; *In re* Mertes' Estate (Ind. 1914) 104 N. E. 753; Bruns *v.* Cope (Ind. 1914) 105 N. E. 471.

[1]People *v.* King (1888) 110 N. Y. 418; People *v.* Warden (1905) 183 N. Y. 223; Lawton *v.* Steele (1894) 152 U. S. 133, 137.

[2]The police power does not come into conflict with the Fourteenth Amendment so long as the discrimination is reasonable. Barbier *v.* Connolly (1884) 113 U. S. 27.

[3]People *v.* Williams (1907) 189 N. Y. 131; People *v.* Wilber (1910) 198 N. Y. 1. The discrimination must be clearly arbitrary and unreasonable, not merely possibly so. See Bachtel *v.* Wilson (1906) 204 U. S. 36, 41.

[4]The Appellate Division refused to enjoin the employment of aliens in the construction of the subway, first, because the statute was contrary to the Fourteenth Amendment, and, secondly, because the subway was not a public work. The court did not think it necessary to decide whether the statute violates our treaty with Italy. There have been two decisions on this point in New York; one holding the statute constitutional, People *v.* Ludington's Sons (N. Y. 1911) 74 Misc. 363, the other holding it unconstitutional. People *v.* Warren (N. Y. 1895) 13 Misc. 615. See also 14 Columbia Law Rev., 667.

[5]Patsone *v.* Pennsylvania (1913) 232 U. S. 138. The discrimination here was declared reasonable on the ground that it defined those from whom the evil could be said to be feared.

[6]Trageser *v.* Gray (1890) 73 Md. 250; see 12 Columbia Law Rev., 737.

[7]Commonwealth *v.* Hana (1907) 195 Mass. 262. As peddling affords a great opportunity for fraud, it is desirable for purposes of suit, that peddlers should be citizens with a fixed domicile. The Supreme Court of Maine, however, came to a different conclusion, because it did not consider peddling so open to fraud. State *v.* Montgomery (1900) 94 Me. 192.

States to perform this type of labor, and at less expense to the taxpayers, nor would the public generally be benefited by a reversal of the established and successful policy of the State to extend to aliens as many of the privileges accorded to citizens as possible.[8] As pointed out by the Appellate Division, the discrimination appears to be purely arbitrary, and in no way connected with the public welfare.

The legislature has recently been attempting to increase its control and regulation of work done for the State by a series of labor laws of which the statute under consideration is the latest and most exacting. The power of the legislature to fix wages and hours, which was at first repudiated in New York as a denial to the city and to the independent contractors of the right of freedom in contracting,[9] was recognized by the Supreme Court,[10] and is now generally admitted.[11] Such statutes, however, afford no support for the alien clause, for they are clearly not discriminatory. They merely prescribe the conditions under which the work shall be done, and they apply alike to all who contract with the State, and with those whom they employ.[12] On the other hand, this statute cannot be grouped with such statutes as the Arizona law, prohibiting the employment of more than 20 per cent. of aliens by any corporations within the State.[13] These statutes are void because they deny or infringe the right to labor and engage in any lawful calling, a right protected by the Constitution.[14] The theory on which these laws are based, if carried to its logical conclusion, would allow the State to prevent aliens from working at all,[15] which is not the case in the New York statute, for it does not necessarily follow that because the State as an employer refuses to employ aliens, it may prevent anyone else from doing so. Though not open to the above objection, the New York law does appear to be unconstitutional

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[8]See People *v.* Coler (1901) 166 N. Y. 1, 17.

[9]People *v.* Coler, *supra.* A distinction was suggested where the State employed laborers directly. People *v.* Orange etc. Co. (1903) 175 N. Y. 84. To overcome the effect of these decisions, the constitution of New York was amended in 1905 to permit the legislature to regulate wages and hours in the construction of public works, whereupon the statute was reenacted and, as to these provisions, declared constitutional. People *v.* Metz (1908) 193 N. Y. 148.

[10]Atkin *v.* Kansas (1903) 191 U. S. 207.

[11]Byars *v.* State (1909) 2 Okla. Cr. 481; *In re* Broad (1904) 36 Wash. 449; State *v.* Livingstone etc. Co. (1906) 34 Mont. 570; People *v.* Metz, *supra*; *contra*, Cleveland *v.* Construction Co. (1902) 67 Ohio St. 197, based on People *v.* Coler, *supra*, which is no longer law.

[12]Atkin *v.* Kansas, *supra*, 224.

[13]The decision of a special court of three federal judges, handed down January 7th, declaring unconstitutional the Arizona Anti-Alien Employment Act, has not yet been officially reported, but appears in short form in the New York *Times* of January 8th.

[14]Yick Wo *v.* Hopkins (1885) 118 U. S. 356; People *v.* Marx (1885) 99 N. Y. 377; People *v.* Williams, *supra.*

[15]From the court's opinion in the Arizona Alien Labor Case, as reported in the New York *Times*: "If under guise of police regulation a State can prohibit an employer from employing more than 20 per cent. of alien labor it can prohibit him from employing more than 5 per cent., and if 5 per cent. any at all."

as a denial of the equal protection of the laws.[16] The alien is being arbitrarily deprived of an opportunity of employment which the citizen of the United States enjoys. While it is true that no one is entitled, as of absolute right, to employment by the State,[17] nevertheless, the alien should not be put at a disadvantage by the denial of the opportunity to ask for such employment, nor should the State be allowed, under the guise of prescribing conditions,[18] to deprive him of the equal protection of the laws.[19]

Some Attributes of Leaseholds Under Modern Statutes.—In the recent case of *Spiro* v. *Robinson* (Ind. App. 1914) 106 N. E. 726, a wife made a lease of her separate real estate in her own name. The court upheld the transaction, deciding that the statute forbidding a conveyance or incumbrance by the wife of her property without joining her husband, did not apply to a lease. Since the word conveyance is limited, in the usual sense of the word, to transactions in real property,[1] the court logically held that the term is not properly applicable to a leasehold interest, and in so deciding is in accord with the great weight of modern authority construing similar provisions in the Married Women's Acts.[2] This construction is justified on the ground that the right to lease her property is a necessary incident to the wife's complete enjoyment thereof,[3] and clear expression should be required of the legislative intent to deny such right. Under the homestead statutes, which forbid a conveyance by the husband without his wife's consent, the courts have maintained the logical view as well, as long as the lease by the husband does not disturb his wife's possession in the premises.[4] Where, however, the lease would have the effect of unsuiting the homestead for the purposes of a residence, the courts have departed from the strict construction, in order to render substantial justice, and have denied the husband's sole right.[5] The tendency is to construe these statutes so as to protect the wife whenever possible.

It may be stated as a general proposition that the word conveyance has been construed as not to embrace in its meaning a term for years.[6] Where, however, the result will be to cause actual injustice,

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[16]See Gulf etc. Ry. *v.* Ellis (1897) 165 U. S. 150; Yick Wo *v.* Hopkins, *supra.*

[17]Atkin *v.* Kansas, *supra*, 223: "No employee is entitled, of absolute right, and as a part of his liberty, to perform labor for the state."

[18]The State is not prescribing conditions when it makes arbitrary discrimination. Atkin *v.* Kansas, *supra*, 224.

[19]People *v.* Warren, *supra*; but see People *v.* Ludington's Sons, *supra.*

[1]See Perkins *v.* Morse (1885) 78 Me. 17; Abbott's Law Dictionary, 285; see Bouvier's Law Dictionary, Rawle's Third Revision, 671.

[2]Sullivan *v.* Barry (1884) 46 N. J. L. 1; Perkins *v.* Morse, *supra*; see Vandevoort *v.* Gould (1867) 36 N. Y. 639; but see Buchanan *v.* Hazzard (1880) 95 Pa. 240; Dority *v.* Dority (1903) 96 Tex. 215.

[3]See Sullivan *v.* Barry, *supra.*

[4]See Engelhardt *v.* Batla (Tex. Civ. App. 1895) 31 S. W. 324.

[5]Mailhot *v.* Turner (1909) 157 Mich. 67.

[6]Under the usual recording acts, providing simply for the recordation of conveyances, a lease need not be recorded. Tuohy's Estate (1899) 23 Mont. 305. In many States, however, of which New York is a prominent

as in the case of leases for a long term, the strict construction is often relaxed. Although the long term lease has been uniformly said, in absence of statute, to constitute personal property,[7] the courts are nevertheless ready to recognize the essential nature of these interests in order to carry out the actual intention of the legislature, and have, accordingly, decided that they amount to conveyances, on the ground that a lease for a long term has all the practical effects of conveying the fee.[8] The same propensity has been shown in the construction of mining[9] and timber[10] leases, which, however, provide from their very nature for the severance of substantial portions of the realty, and may, therefore, be said to be conveyances even in the technical sense.

In holding that a lease is not an incumbrance, the court in the principal case undoubtedly decided correctly. An incumbrance refers to an interest in the nature of a pledge or mortgage,[11] rather than to a personal contract such as a lease.[12] Nevertheless, when a conveyance of real estate includes a covenant against incumbrances a prior leasehold interest will constitute a breach of the covenant.[13] Where the sale is made for purposes of resale or development, the existence of a prior leasehold will usually interfere with the complete enjoyment of the vendee's estate,[14] and the courts seem justified in disre-

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example, the recording act provides specifically that a conveyance shall include leaseholds, except for a term not exceeding three years. N. Y. Consol. Laws, Real Property Law, § 290. An assignment of a lease as security, need not, however, be recorded either as a real estate mortgage, or as a chattel mortgage. Booth *v.* Kehoe (1877) 71 N. Y. 341; see Hutchinson *v.* Bramhall (1886) 42 N. J. Eq. 372, overruling Decker *v.* Clark (1875) 26 N. J. Eq. 163.

Another question arises where the statute provides, as it does in New York, that implied covenants in real estate are abolished. See 1 Rev. Stat., 738. It was at first decided, by applying the definition given in the Recording Act, Art. 9, § 290, that there were no implied covenants in leaseholds for over three years. Kinney *v.* Watts (N. Y. 1835) 14 Wend. 38. Nevertheless, by a subsequent application of the principle of strict construction, this case was overruled and the law in this State was settled that implied covenants in leaseholds have not been abolished. Tone *v.* Brace (N. Y. 1845) 11 Paige 566; see New York *v.* Mabie (1855) 13 N. Y. 151; but see Koeber *v.* Somers (1901) 108 Wis. 497, overruling Shaft *v.* Carey (1900) 107 Wis. 273.

[7]Bracton, 27; 1 Reeves, Real Property, 586.

[8]State *v.* Morrison (1898) 18 Wash. 664; but see Perkins *v.* Morse, *supra.*

[9]Waskey *v.* Chambers (1912) 224 U. S. 564; but see Heal *v.* Niagara Oil Co. (1897) 150 Ind. 483.

[10]Milliken *v.* Faulk (1895) 111 Ala. 658.

[11]See Sullivan *v.* Barry, *supra.*

[12]It is possible that a lease for a sufficiently long term will constitute an incumbrance. See Lockwood *v.* Middlesex etc. Co. (1880) 47 Conn. 553, 559.

[13]See Van Wagner *v.* Van Nostrand (1865) 19 Ia. 422; note to case of Musial *v.* Kudlick (Conn. 1913) 34 Ann. Cas. 1172, 1176; Rawle, Covenants for Title (5th ed.) § 76.

[14]See Hoover *v.* Chambers (1887) 3 Wash. Terr. 26, 30, in which the court, in distinguishing the conditions of leaseholds in England from those in the United States, said: "There land is generally in large holdings, here in small; there rent is principally sought, here possession; there the value of land is comparatively fixed and stable, here it is fluctuating and

garding the technical meaning of the term incumbrance. Where, however, the vendee has bought land for purposes of investing in the rents and profits of the estate, the presence of leaseholds is assumed to have been contemplated by the parties to the contract, and the covenant against incumbrances is not, therefore, held infringed.[15]

Enforcement of Ultra Vires Contracts.—Corporations are considered creatures of the law, having only such rights and powers as the legislature has conferred upon them.[1] According to the strict theorists, acts of a corporation beyond its charter limits are null in the eyes of the law, but theoretical concepts of corporations have frequently been forced to yield to practical expediency.[2] It has been asserted, on the other hand, that corporations have the power to exceed their charters just as individual persons can exceed their rights,[3] a contention that finds no small support in the universal liability of a corporation for its torts.[4] Yet even under the latter more liberal view, acts beyond the authorized limit are contrary to the law, and an illegal contract cannot be the basis of an action.[5] There would seem to be considerable logic with the Supreme Court, and the courts of last resort of many of the States of this country, in maintaining the strict doctrine of *ultra vires,* that a contract made by a corporation in excess of its granted powers is void.[6]

In opposition to the foregoing decisions, however, there is a large group typified by the recent case of *Seamless Pressed Steel, etc. Co.* v. *Monroe* (Ind. 1914) 106 N. E. 538, which reject the stricter theory to the extent of allowing a party who has performed his share of an *ultra vires* contract to recover on the contract itself.[7] It may be well to examine the theory on which this position depends. These courts do not classify contracts in excess of chartered powers with those against public policy, or in violation of positive statute, on which

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generally and rapidly appreciating; there land is capital, here it is a commodity; there its uses remain largely the same from generation to generation, here they are infinitely varied, and changeable with every new possessor." It is submitted that the nature of leaseholds in our large cities approximates more nearly to conditions in England than to conditions in other parts of the United States.

[15]See Rawle, Covenants for Title (5th ed.) 91, note; Hoover *v.* Chambers, *supra.*

[1]Thomas *v.* Railroad Co. (1879) 101 U. S. 71; 2 Kent, Comm., *298.

[2]Prof. I. M. Wormser, Piercing the Veil of Corporate Entity, 12 Columbia Law Rev., 496.

[3]2 Morawetz, Private Corporations, §§ 648, 649.

[4]Salt Lake City *v.* Hollister (1886) 118 U. S. 256; Bissell *v.* Michigan etc. R. R. (1860) 22 N. Y. 258.

[5]15 Columbia Law Rev., 175.

[6]Central Transportation Co. *v.* Pullman's etc. Co. (1891) 139 U. S. 24; First Nat. Bank *v.* American Nat. Bank (1903) 173 Mo. 153; see Leigh *v.* American Brake-Beam Co. (1903) 205 Ill. 147.

[7]Bath Gas Light Co. *v.* Claffy (1896) 151 N. Y. 24; McQuaig *v.* Gulf Naval Stores Co. (1908) 56 Fla. 505; see Eastman *v.* Parkinson (1907) 133 Wis. 375.

they allow no action,[8] and it might be inferred that they regard *ultra vires* as a matter for the State or stockholders only,[9] were it not for the fact that they treat it as a perfect defense where a contract is wholly executory.[10] An attempt is sometimes made to justify these decisions on the basis of estoppel,[11] but one cannot do by estoppel what the law forbids the doing of directly, and this explanation is usually rejected.[12] Even if the difficulty were overcome that all persons dealing with a corporation are bound to ascertain the limits of its corporate power so that the doctrine could be invoked in favor of an individual, it would clearly fail to explain those cases where the corporation itself is the plaintiff, for the corporation could not be deceived by the statements of another person as to its own powers. Attempts to found the doctrine of recovery in these cases on sound theory seem difficult, but the true explanation may be found in the feeling of the judges that it would be grossly unjust to allow one who has received the benefit of performance to avail himself of a technical defense to avoid his liability.[13] Yet it seems no great hardship to deprive a man of his contemplated profits provided he receives just compensation, and even those courts which refuse to give any vitality to the contract, allow recovery of an equitable nature for property delivered, or services rendered.[14] It must be admitted, however, that in exceptional cases recovery on the contract itself seems the only adequate remedy,[15] and this fact is the strongest support of the contention that public policy justifies a recovery on *ultra vires* contracts.

That public policy may modify theories of corporation law, is recognized even by the strict federal courts, which allow recovery

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[8]Penn *v.* Bornman (1882) 102 Ill. 523; Franklin Nat. Bank *v.* Whitehead (1898) 149 Ind. 560; Pratt *v.* Short (1880) 79 N. Y. 437.

[9]Eastman *v.* Parkinson, *supra*; Harris *v.* Independence Gas Co. (1907) 76 Kan. 750. It has been asserted that an *ultra vires* contract may be validated by ratification of the stockholders; Moore *v.* Moonell Co. (N. Y. 1899) 27 Misc. 235; but this doctrine is generally rejected. Savannah Ice Co. *v.* Canal etc. Co. (1913) 12 Ga. App. 818.

[10]Jemison *v.* Citizens' Sav. Bank (1890) 122 N. Y. 135.

[11]Auerbach *v.* LeSueur Mill Co. (1881) 28 Minn. 291; Vought *v.* Eastern etc. Assn. (1902) 172 N. Y. 508.

[12]National Home etc. Assn. *v.* Home Savings Bank (1899) 181 Ill. 35; Humbolt Mining Co. *v.* American Mfg. etc. Co. (C. C. A. 1894) 62 Fed. 356.

[13]See Wright *v.* Hughes (1889) 119 Ind. 324; Clark, Corporations, 182 *et seq.*

[14]Citizens' Nat. Bank *v.* Appleton (1910) 216 U. S. 196; U. S. Brewing Co. *v.* Dolese etc. Co. (1913) 259 Ill. 274; Ely *v.* Oakland Circuit Judge (1910) 162 Mich. 466. This recovery is sometimes given in an action for money had and received, White *v.* Franklin Bank (1839) 39 Mass. 181; Leigh *v.* American Brake-Beam Co., *supra*, and other times in an action for an accounting. Newcastle etc. Ry. *v.* Simpson (C. C. 1885) 23 Fed. 214; Boyd *v.* American Carbon Black Co. (1897) 182 Pa. 206.

[15]Chapman *v.* Iron Clad etc. Co. (1898) 62 N. J. L. 497. The defendant had contracted to hire the plaintiff if the plaintiff would buy stock in the defendant corporation, and agreed to buy back the stock when the plaintiff should be dismissed. The defendant, having dismissed the plaintiff, refused to perform. The court said that the contract was not *ultra vires*, but that if it had been the defense would have been inadmissible, since justice could be obtained only by enforcing the contract.

where the contract is within the general scope of corporate powers with which the other parties seem to be familiar, but is beyond the chartered powers in the particular circumstances of its performance, of which the other party can know nothing. This includes cases where a loan is in excess of the limit of indebtedness,[16] or the contract is for an unauthorized purpose.[17] Again, public policy requires that a *bona fide* holder for value of *ultra vires* commercial paper should be protected.[18] It is thus seen that public policy, even in the strictest jurisdictions, seems to take precedence, to some extent, over metaphysical reasons in the formulation of a doctrine of *ultra vires*. But if we accept the premise that corporation restrictions are for the benefit of the public generally,[19] we may well urge that public policy does not require the enforcement of *ultra vires* contracts, but rather forbids it as tending to encourage the abuse of corporate powers.

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[16]Connecticut etc. Bank *v.* Fiske (1880) 60 N. H. 363.

[17]Colorado Springs Co. *v.* American Pub. Co. (C. C. A. 1899) 97 Fed. 843.

[18]Credit Co. *v.* Howe Machine Co. (1886) 54 Conn. 357; Monument Nat. Bank *v.* Globe Works (1869) 101 Mass. 57; Auerbach *v.* LeSueur Mill Co., *supra*.

[19]See Pittsburg etc. Ry. *v.* Keokuk etc. Bridge Co. (1889) 131 U. S. 371, 384.

RECENT DECISIONS.

ARNOLD BROCK, *Editor-in-Charge.*
CYRIL J. CURRAN, *Associate Editor.*

BAIL—DISCHARGE—PRESUMPTION OF DEATH.—The disappearance of the accused at the time of a tornado, *held* not to exonerate his bail from liability on their bond. *Bryan* v. *State* (Ark. 1914) 167 S. W. 484.

It is well settled that bail will be exonerated where the appearance of the principal is rendered impossible by an act of the law, see *Taylor* v. *Taintor* (1872) 16 Wall. 366, an act of the obligee, *State* v. *Funk* (1910) 20 N. Dak. 145, or an act of God, such as the death of the principal. *Pynes* v. *State* (1871) 45 Ala. 52. While sickness of the principal will not discharge the sureties, since they stand bound until he is able to appear, *Bonner* v. *Commonwealth* (Ky. 1905) 85 S. W. 1196, if they subsequently bring the accused into court, his sickness will be a good defense to an action on the bond, *People* v. *Tubbs* (1868) 37 N. Y. 586, or a ground for vacating a judgment rendered against them. *Russell* v. *State* (1872) 45 Ga. 9. The liability of the bail attaches at the time of forfeiture, but where the impossibility arises subsequently, and before final judgment on the bond, the sureties are generally released. *Mather* v. *People* (1850) 12 Ill. 9; *State* v. *Traphagen* (1883) 45 N. J. L. 134. Where the accused has disappeared and his continued absence is unexplained, death may be inferred from circumstances presenting a strong probability of death. *Merritt* v. *Thompson* (N. Y. 1858) 1 Hilt. 550. The presumption, in such a case, that life continues for seven years, *Montgomery* v. *Bevans* (C. C. 1871) 1 Sawy. 653; see 9 Columbia Law Rev. 435, may be rebutted by proof of facts from which an inference might be drawn that death occurred before the lapse of seven years; as, for example, that the absent person within that time encountered some specific peril or came within the range of some impending danger which might reasonably be expected to destroy life. *Merritt* v. *Thompson, supra*; *Davie* v. *Briggs* (1878) 97 U. S. 628, 634. All the circumstances should be considered, however, and in the principal case the motive for concealment afforded by the criminal indictment would strongly militate against such inference of death. See *Wolff's Estate* (Pa. 1883) 12 Wkly. Notes Cas. 535; *Northwestern Ins. Co.* v. *Stevens* (C. C. A. 1895) 71 Fed. 258.

BANKRUPTCY—TITLE OF TRUSTEE—WIDOW'S RIGHTS AFTER DEATH OF BANKRUPT.—A Georgia statute provided that the widow and children of an insolvent should receive a year's support out of the estate possessed by him at the time of his death. The plaintiff's husband was adjudicated bankrupt, and died after the appointment of a trustee. *Held,* the widow is entitled to the allowance made by the local statute, under § 8 of the Bankruptcy Act. *Hull* v. *Dicks* (1915) 35 Sup. Ct. Rep. 152.

It is provided by § 8 of the Bankruptcy Act of 1898 that the death or insanity of a bankrupt shall not abate the proceedings; but that the widow and children shall not be deprived thereby of any rights of dower or allowance granted by the State of the bankrupt's residence. Of course, since the common law dower of the wife is a

vested interest, it has never been affected by the sale of the bankrupt's lands. See *Porter* v. *Lazear* (1883) 109 U. S. 84; *Thomas* v. *Woods* (C. C. A. 1909) 173 Fed. 585. It has been held, however, that if a statute giving dower or allowances expressly limits the rights to the estate held by the husband at the time of his death, they are not saved by the proviso in § 8, in cases where the bankrupt dies after the trustee has taken title under § 70a. *In re McKenzie* (C. C. A. 1905) 142 Fed. 383. But since the bankrupt may affect a composition with his creditors or claim a homestead by way of exemption, other courts have held that he has an estate left in which the widow has rights and which limits the title of trustee. *In re Slack* (D. C. 1901) 111 Fed. 523; *In re Dicks* (D. C. 1912) 198 Fed. 293. The principal case bases its decision largely on the ground that the proviso in § 8 must be read to mean that the widow and children retain the same rights they would have possessed had no trustee been appointed. It may be supported as effecting the apparent intention of the proviso, although it can hardly be doubted that the Georgia statute was never intended to confer rights in an estate which had passed out of the hands of the deceased. *Summerford* v. *Gilbert* (1867) 37 Ga. 59.

Bills and Notes—Bona Fide Purchasers for Value—Usury.—In an action by a *bona fide* holder in due course against the maker of a note and its indorsers, the defense of usury in its inception was *held* not to be available. *Emanuel* v. *Misicki et al.* (1914) 149 N. Y. Supp. 905.

When a negotiable instrument given for a usurious consideration is made absolutely void by statute, it remains so even in the hands of a *bona fide* purchaser for value, Norton, Bills & Notes (4th ed.) 311; *Claflin* v. *Boorum* (1890) 122 N. Y. 385, and since such statutes are declarative of a rule of public policy it would seem that such a note even in the hands of a holder in due course should not be rendered valid on any theory of estoppel against the maker. *Cf. Kyser* v. *Miller* (1908) 144 Ill. App. 316; but see *Claflin* v. *Boorum, supra.* Where a note, valid in its inception, is subsequently transferred as part of a usurious transaction, it is generally held that the maker or the indorser can defend against the indorsee and all subsequent takers on the ground that the transfer of the note for usurious consideration passed no title. Norton, Bills & Notes (4th ed.) 315. It has sometimes been said, however, that not only a *bona fide* purchaser for value but even a party to the usury may maintain an action against the maker. See *Armstrong* v. *Gibson* (1872) 31 Wis. 61; *Knights* v. *Putnam* (Mass. 1825) 3 Pick. 184; but see *Freeman* v. *Brittin* (1839) 17 N. J. L. 191. In some jurisdictions the statute expressly reserves the right of a *bona fide* holder for value, see *Robinson* v. *Smith* (1895) 62 Minn. 62, and it has been held that where the statute makes usury a personal defense at the instance of the debtor, such defense is not available against a holder in due course. See *Bradshaw* v. *Van Valkenberg* (1896) 97 Tenn. 316. In New York the statute declaring void contracts made for usurious consideration, has been held by the Appellate Term to be amended by the provisions of the Negotiable Instruments Law with reference to *bona fide* purchasers, so as to permit such holders to recover upon a note usurious in its inception, *Klar* v. *Kostiuk* (N. Y. 1909) 65 Misc. 199; *contra, Crusins* v. *Siegman* (N. Y. 1913) 81 Misc. 367, and it was upon this authority that the court in the principal case based its decision.

CONSTITUTIONAL LAW—ALIEN LABOR LAW—EMPLOYMENT OF ALIENS ON PUBLIC WORKS.—The defendant was fined for violating § 14 of the Labor Law, providing that no aliens should be employed on the construction of public works. *Held,* the judgment should be reversed because the statute was contrary to the Fourteenth Amendment. *People* v. *Crane* (N. Y. 1914) 150 N. Y. Supp. 933. See Notes, p. 263.

CONSTITUTIONAL LAW—FREEDOM OF CONTRACT—NON-MEMBERSHIP IN LABOR UNION AS CONDITION OF EMPLOYMENT.—A statute of Kansas made it unlawful to require as a condition of employment that the employee shall not become or remain a member of any labor organization. *Held,* three judges dissenting, the statute is unconstitutional. *Coppage* v. *Kansas* (U. S. Sup. Ct., October Term, 1914, No. 48). Not yet reported.

The right of a person to determine whose labor he will buy is as well recognized as the right to sell his labor to anyone he pleases. A party has, moreover, a right to stipulate the conditions upon which he will enter into the relation of employment. 2 Tiedeman, State & Federal Control of Persons & Property, § 204. But this right is not protected as an absolute one by the Due Process Clause of the Constitution, and the State may, under its police powers, impose any restraint upon it that is reasonably necessary for the general welfare of the public. See *Holden* v. *Hardy* (1898) 169 U. S. 366; *Chicago, etc. R. R.* v. *McGuire* (1911) 219 U. S. 549. The court, in the main case, argues that the advantages and inequalities, which are the direct result of our constitutional protection of the right of freedom of contract and private property, cannot be done away with by statute. But protective labor statutes which have this very object have been upheld as a valid exercise of the police power, *McLean* v. *Arkansas* (1909) 211 U. S. 539; *Erie R. R.* v. *Williams* (1914) 233 U. S. 685, and it would seem, therefore, that the real consideration is whether there is a general governmental necessity or public demand for the particular legislation. It might be urged, indeed, that the statute has the effect of promoting harmonious relations between capital and labor, and so would seem valid as an exercise of the police power to preserve the public welfare as well as the economic liberty of the employee. *Cf.* Freund, Police Power, § 500. But the cases in the States show decidedly that this particular manner of protection is not based upon a predominating public opinion or demand, *People* v. *Marcus* (1906) 185 N. Y. 257; *Gillespie* v. *People* (1900) 188 Ill. 176, and so the court is amply sustained by authority in following its previous position that such legislation is an unwarranted interference with the freedom of contract. *Adair* v. *United States* (1908) 208 U. S. 161; 8 Columbia Law Rev. 301.

CONSTITUTIONAL LAW—HOURS OF LABOR—REST DAY.—A statute provided that an employer of labor in a factory or mercantile establishment should allow employees at least twenty-four consecutive hours of rest in every seven consecutive days. *Held,* this was a proper exercise of the police power. *People* v. *Klinck Packing Co.* (N. Y. 1915) 52 N. Y. L. J. 1925.

Statutes regulating conditions and hours of labor are within the police power when they can be regarded as necessary sanitary measures. See Freund, Police Power 302. So it has been held that it is a valid exercise of the police power to provide a ten hour a day labor law for

women working in laundries, *Muller* v. *Oregon* (1908) 208 U. S. 412, or an eight hour law for persons engaged in mining occupations. *Holden* v. *Hardy* (1897) 169 U. S. 366. While this power is not unlimited and the restriction on the right to contract or labor must bear a reasonable relation to the public welfare, see *Lochner* v. *New York* (1905) 198 U. S. 45, the courts are inclined to uphold a statute which does not effect material restraints upon individual liberty, and is obviously for the general welfare of the public. Sunday labor laws fall within this class of legislation, *cf.* 4 Blackstone Comm. *63, and have been generally sustained on the theory that they provide for a day of rest, which is promotive of the public welfare, 1 Tiedeman, State & Federal Control of Persons and Property, 213, 222; see *Hennington* v. *Georgia* (1896) 163 U. S. 299; *Judefind* v. *State* (Md. 1894) 22 L. R. A. 721 and note, although there have been a few decisions supporting the observance of Sunday as a religious institution. See 1 Tiedeman, State & Federal Control of Persons and Property, 211. If the state may designate a certain day as a day of rest from labor, it could, *a fortiori,* provide for a day of rest and leave the determination of the particular day to the employer, since this results in even less restraint upon individual liberty.

Contracts—Public Policy—Exemption of Common Carrier from Tort Liability.—The plaintiff in consideration for the construction of a spur track upon its premises, agreed to exempt the defendant railroad from all liability for damages by fire resulting from the operation of trains upon the track. *Semble,* the contract is not void as against public policy. *Carolina etc. Ry.* v. *Unaka Springs Lumber Co.* (Tenn. 1914) 170 S. W. 591.

Contracts which tend to promote negligence on the part of a common carrier in the discharge of its public obligations are regarded as conflicting with public policy. See Burdick, Torts (3rd ed.) 88. Construction of side tracks for the convenience of private owners, however, is not ordinarily an obligation of a common carrier, and a railroad may therefore contract to be exempt from damages for fires caused by its negligent operation of the spur. *Missouri etc. Ry.* v. *Carter* (1902) 95 Tex. 461, 474; *Porter* v. *New York etc. R. R.* (1910) 205 Mass. 590; *Mann* v. *Pere Marquette R. R.* (1903) 135 Mich. 210. Moreover, it has been held that the exemption in such cases may be made to include operations on the main track as well. *Mayfield* v. *Southern Ry.* (1910) 85 S. C. 165; *Richmond* v. *New York etc. R. R.* (1904) 26 R. I. 225; *contra, Stoneboro etc. Co.* v. *Lake Shore etc.* (1913) 238 Pa. 289. If there is a conflict of evidence as to whether the negligent operation was on the main or spur track, and the exemption applies to the spur track only, the burden will be upon the railroad to prove facts which will entitle it to the exemption under the contract. *Thomason* v. *Kansas etc. Ry.* (1909) 122 La. 995. While a common carrier is generally under no duty to connect with private sidings, such duty may be imposed by statute or by special circumstances, 1 Wyman, Public Service Corporations, § 817 *et seq.,* and in such cases it would seem that the rule denying a common carrier the right to exempt itself from liability for negligence in the performance of its public duties might well apply. *Cf.* 4 Elliott, Railroads (2nd ed.) § 1645.

Corporations—Distribution of Assets—Liability of Directors.—The directors of a corporation, without formal dissolution, distributed its assets among the bondholders, the entire amount being insufficient

to satisfy such claims. In a proceeding by a judgment creditor against the directors under §§ 90, 91 of the General Corporation Law, *held* that any recovery by a creditor was limited to a misapplication of property to which he otherwise would have been entitled. *Curran* v. *Oppenheimer* (N. Y. App. Div. 1914) 150 N. Y. Supp. 369.

At common law, corporate creditors had no right to meddle with the management of the corporation nor to proceed against its directors for misconduct unless such misconduct resulted in dissipating the assets so that insufficient remained to satisfy their claims. 1 Morawetz, Corporations, § 568. To-day, by statute in New York, a creditor is given the right to proceed against directors for misappropriation of assets. General Corporation Law, §§ 90, 91. Thus, where the assets of a corporation have been distributed among the stockholders regardless of outstanding claims, the right of the creditor to proceed against the directors is clear. *Darcy* v. *Brooklyn & N. Y. Ferry Co.* (1909) 196 N. Y. 99. But it has been held that, as at common law, it is only to a party injured that the defendants are to account, see *People* v. *Equitable Life Assurance Society* (1908) 124 App. Div. 714, 739, so that the statute would not seem to create any new rights in a creditor in this regard. Furthermore, according to the revisers' notes these statutory provisions were originally enacted to allow the State to go against directors in equity for mismanagement of corporate affairs. See *People* v. *Equitable Life Assurance Society, supra*, p. 736. In *People* v. *Ballard* (1892) 134 N. Y. 269, the court in an elaborate opinion, decided that the State has an interest separate and distinct from that of a creditor or stockholder, and could therefore maintain an action under §§ 90 and 91 of the General Corporation Laws without a relator. Since, therefore, the wrongful act in question was the failure to comply with the statutory requirements as to dissolution, and no injury had accrued to the plaintiff, since the bondholders, as preferred creditors, were entitled to the entire amount distributed, it would seem that the only right of interference was in the State.

Corporations—Ultra Vires Contracts—Right to Recover.—A corporation contracted to pay the plaintiff commission for securing a factory site for it, and this site he actually acquired. The corporation defends a suit on this contract on the ground that the agreement was in excess of the powers conferred by its charter. *Held,* since the defendant had received benefit under the contract he could not set up *ultra vires* as a defense. *Seamless Pressed Steel etc. Co.* v. *Monroe* (Ind. 1914) 106 N. E. 538. See Notes, p. 267.

Courts—Jurisdiction—Collateral Attack of Previous Conviction.—The defendant convicted as a second offender, moved for a new trial on the ground that the prior conviction was void because he was at that time under 16 years of age, and therefore not within the jurisdiction of the court. *Held,* since the court in the prior suit had jurisdiction of the subject matter and of the person of the defendant, the validity of its judgment could not be attacked collaterally. *People* v. *De Bellis* (1914) 150 N. Y. Supp. 1064.

Where the court has jurisdiction of the parties and of the subject matter, its judgment is not open to collateral attack. 1 Black, Judgments, § 245. But a party may, even in a collateral attack, show by extrinsic facts that the court had no jurisdiction, though the judg-

ment on its face shows jurisdictional facts. *Ferguson* v. *Crawford* (1877) 70 N. Y. 253; *Harrington* v. *People* (N. Y. 1849) 6 Barb. 607; but see 1 Bailey, Jurisdiction, 136. In States, therefore, where the juvenile courts have exclusive jurisdiction of offenses by children, *State* v. *Dunn* (1907) 75 Kan. 799; *cf. Mill* v. *Brown* (1907) 31 Utah 473, 477, a conviction of a child under the statutory age by any other court, might be subject to a collateral attack. In New York City, however, the Children's Court is merely a special department of the court of Special Sessions, New York Charter (1906) §§ 1399, 1418, and there was, in the principal case, therefore, no lack of jurisdiction of the person of the defendant in the court which convicted him on the prior trial. It follows that the prior conviction could not be collaterally attacked on this ground. The fact that the defendant was at that time below the age at which the statute declares a person amenable to conviction for a crime, N. Y. Penal Law, § 2186, is at most an irregularity which the defendant waived by not taking objection at a seasonable time.

Criminal Law—Larceny—Asportation by Innocent Agent.—The defendant sold a bale of cotton to which he had no title and which was not in his possession. *Semble*, in such a case, when an innocent purchaser removes the property, the seller is guilty of larceny; but where the purchaser knows the seller had no title, removal by him is not asportation by the seller. *Smith* v. *State* (Ga. 1914) 83 S. E. 437.

It is well settled that a person not actively participating may, through an innocent agent, do an act which constitutes a crime. *Adams* v. *People* (1848) 1 N. Y. 173; see Clark, Criminal Law, 101. Although a vendee can hardly be said to act for anyone but himself in assuming control over the property sold, it has sometimes been held that asportation by an innocent purchaser is referable to a guilty vendor, so as to make the latter chargeable with larceny. *Lane* v. *State* (1900) 41 Tex. Cr. 558; *State* v. *Hunt* (1877) 45 Ia. 673; *contra, People* v. *Gillis* (1889) 6 Utah 84. The distinction drawn in the principal case between an innocent purchaser and one having knowledge of the facts seems to arise from the common law rule that where the one acting has sufficient knowledge of the facts to be himself guilty of the crime, the instigator is only accessory before the fact if absent at the time of the act, or a principal in the second degree if present aiding and abetting. *Queen* v. *Manley* (1844) 1 Cox C. C. 104; *Williams* v. *State* (1874) 47 Ind. 568; see *Wixson* v. *People* (N. Y. 1860) 5 Park. Cr. 119, 129. Where by statute, the accessory is made liable for the same crime as the principal, it would seem that the purchaser's knowledge or ignorance of the facts should make no difference in the criminality of the seller, since in the case of a guilty purchaser, the seller, by virtue of the statute, would be guilty of larceny, and if the purchaser were innocent, the vendor might be convicted of larceny under the authorities above cited.

Descent and Distribution—Statutes—Effect of Murder of Intestate by Heir.—A youth murdered his father, mother and sister; he was entitled, as heir, under the statutes regulating descent and distribution, to the estates of his victims. *Held*, the murderer took an absolute estate by descent, and a bill to have him declared a trustee

ex maleficio could not be maintained for want of equity. *Wall* v. *Pfanschmidt* (Ill. 1914) 106 N. E. 785.

While intending to kill his wife's paramour, a man killed his wife. *Held,* his conviction for manslaughter was not an equitable bar to his taking a distributive share in his wife's estate under the New York Statute of Distributions as he had no intention of killing her and profiting by her death. *In re Wolf* (Surr. Ct., N. Y. Co., 1914) 150 N. Y. Supp. 738. See Notes, p. 260.

Descent and Distribution—Statutory Construction—Illegitimacy.—A statute provided that illegitimate children should be heirs of the property of which their mother died possessed. The mother of the claimants was illegitimate, and died prior to the enactment of the statute. The claimants, as heirs through their mother, claimed the estate of their grandmother, who died after the enactment of the statute. *Held,* they were entitled to the estate. *Trout* v. *Burnette* (S. C. 1914) 83 S. E. 684.

At common law an illegitimate child can not be an heir, and it can have no heirs other than those of its own body. 1 Blackstone, Comm. *459. In one state, by decisions substantially following the Roman Law, *Dickinson's Appeal* (1875) 42 Conn. 491, and in most of the other states by statute, this harsh rule of the common law has been modified. Some states permit a bastard to inherit from the father, if during his lifetime, the father has recognized the bastard as his own child. See *Morin* v. *Holliday* (1906) 39 Ind. App. 201; *Rohrer* v. *Muller* (1900) 22 Wash. 151. Practically everywhere, an illegitimate child may now inherit from its mother. See *Foster* v. *Lee* (1911) 172 Ala. 32; *Berry* v. *Powell* (1907) 101 Tex. 55. As these statutes are in derogation of the common law, many courts have held that in the absence of express provision, they confer no right of inheritance upon the issue of the illegitimate child as to the property of the latter's mother. *Curtis* v. *Hewins* (Mass. 1846) 11 Metc. 294; *Truelove* v. *Truelove* (1909) 172 Ind. 441. Some courts, however, as in the principal case, have regarded such legislation as remedial, and upon principles of representation as established by local statutes, have given the same rights of inheritance to the bastard's issue. *Goodell* v. *Yezerski* (1912) 170 Mich. 578; see *Sutton* v. *Sutton* (1888) 87 Ky. 216. Such a result is a fair interpretation of the legislative intent, and is representative of the more liberal views now taken of the status of illegitimate children.

Equity—Injunction—Jurisdiction Over Criminal Proceedings.—Repeated prosecutions under a city ordinance were instituted against the plaintiff with a view to injuring her in her business. *Held,* equity had jurisdiction to enjoin such proceedings although they were of a criminal nature. *Cutsinger* v. *City of Atlanta* (Ga. 1914) 83 S. E. 263.

In the absence of an injury to property rights a court of equity is without jurisdiction to restrain the commission of acts merely criminal, *People* v. *Condon* (1902) 102 Ill. App. 449; *People* v. *District Court* (1899) 26 Colo. 386, except where a private citizen may by virtue of a statute bring suit to abate a public nuisance. *Littleton* v. *Fritz* (1885) 65 Iowa, 488. It may be said, moreover, that ordinarily equity has no jurisdiction to enjoin criminal proceedings, *Minneapolis Brewing Co.* v. *M'Gillivray* (C. C. 1900) 104 Fed. 258; *Moses* v. *Mobile* (1875) 52 Ala. 198; see *In re Sawyer* (1888) 124 U. S. 200. Where,

however, the act complained of is such that equity will otherwise interfere for the protection of the rights of property, the mere fact that incidental thereto a crime must be enjoined will not operate to deprive equity of jurisdiction if there be no adequate remedy at law. See *Christie Street Comm. Co.* v. *Board of Trade* (1900) 92 Ill. App. 604. Upon the same principle, if the enforcement of an unconstitutional statute in criminal proceedings works irreparable injury, aid should not be refused and the enforcement thereof should be enjoined. See *Minneapolis Brewing Co.* v. *M'Gillivray, supra*; *Linsley* v. *Natural Carbonic Gas Co.* (1908) 162 Fed. 954. It has been intimated in one jurisdiction that a mere multiplicity of prosecutions under an invalid ordinance might be enjoined on the theory that such prosecutions tend to harass the complainant. See *South Covington etc. Ry.* v. *Berry* (1892) 93 Ky. 43; but see *Ewing* v. *Webster City* (1897) 103 Iowa, 226. The principal case seems perfectly sound in deciding that equity had jurisdiction to stay proceedings under a city ordinance where, in such proceedings, the effort was made unlawfully to effect the plaintiff's property rights. *Port of Mobile* v. *Louisville etc. Ry.* (1887) 84 Ala. 115; *Atlanta* v. *Gate City Gaslight Co.* (1883) 71 Ga. 106, 126.

Evidence—Best Evidence Rule—When Secondary Evidence Admissible.—The plaintiff sued on a contract evidenced by a letter, the possession of which had been fraudulently obtained by the defendant. *Held,* secondary evidence was admissible to prove the contents of the letter without notice to the defendant to produce. *Prieto* v. *Hunt* (Tex. Civ. App. 1914) 167 S. W. 4.

It is well settled that where a written instrument is evidence of rights, it forms the best proof of its contents, and secondary evidence for that purpose is inadmissible unless the non-production of the instrument be legally excused. 2 Wigmore, Evidence, § 1192; Jones, Evidence (2nd ed.) § 200; *Security Trust Co.* v. *Robb* (C. C. A. 1906) 142 Fed. 78. If the proponent has lost the document upon which he predicates his rights, he may introduce secondary evidence of its contents, the loss being a legal excuse for its non-production; *Tayloe* v. *Riggs* (1828) 1 Pet. 591; or if the instrument be in the hands of the adverse party, who refuses to produce it after notice so to do, secondary evidence is admissible. *Gafford* v. *American etc. Co.* (1889) 77 Ia. 736. While notice to the party holding the instrument is usually necessary, in order to show his unwillingness to produce, it is not required when the party has obtained the document from the proponent by fraudulent or forcible means. *Scott* v. *Pentz* (N. Y. 1852) 5 Sandf. 572; *Almy* v. *Reed* (Mass. 1852) 10 Cush. 421; 2 Wigmore, Evidence, § 1207; *cf. Grimes* v. *Kimball* (Mass. 1862) 3 Allen 518. Moreover, where the form of the action or of the pleading gives the party notice to be prepared to produce the instrument, no further notice is required. *Hardin* v. *Kretsinger* (N. Y. 1820) 17 Johns. *293; *Hammond* v. *Hopping* (N. Y. 1835) 13 Wend. 505; *cf. Nealley* v. *Greenough* (1852) 25 N. H. 325. In some States these requirements as to notice have been embodied in statutes. California Code Civ. Proc. § 1938; Idaho Code Civ. Proc. § 5991; Compiled Laws of Utah (1907) § 3401.

Husband and Wife — Desertion — Ante-Nuptial Contracts as to Residence.—A wife refused to live at the home of her husband's parents

because she was unable to live there happily, and the plaintiff refused to provide her a separate home. In an action for divorce by the husband, *held,* her refusal did not constitute desertion, and her ante-nuptial agreement to live at the home of her husband's parents was not binding. *Marshak* v. *Marshak* (Ark. 1914) 170 S. W. 567.

It is well settled that the personal rights and duties of husband and wife growing out of the marital relation are in no manner affected by ante-nuptial contracts, Schouler, Domestic Relations (5th ed.) §§ 38, 171; *Hair* v. *Hair* (S. C. 1858) 10 Rich. Eq. 163, 175, hence the sole question in the principal case is whether the wife's acts, independent of her ante-nuptial agreement, amount to desertion. At common law the husband had the right to fix the matrimonial domicile anywhere in the world, and the wife's refusal to follow constituted desertion. 1 Nelson, Divorce & Separation, § 68. The general principles of this rule have been adopted by numerous decisions in this country, *Messenger* v. *Messenger* (1874) 56 Mo. 329; *Kennedy* v. *Kennedy* (1877) 87 Ill. 250; *Hunt* v. *Hunt* (1878) 29 N. J. Eq. 96; *Franklin* v. *Franklin* (1906) 190 Mass. 349, but usually subject to the qualification that the husband's power must be reasonably exercised; *Franklin* v. *Franklin, supra*; and at least one court has held that he must show such reasonableness by positive, affirmative evidence. *Gleason* v. *Gleason* (1857) 4 Wis. 64. In accordance with this tendency it has repeatedly been held that establishing the domicile at the home of the husband's parents may be unreasonable, *Wright* v. *Wright* (N. J. 1899) 43 Atl. 447; see *Albee* v. *Albee* (1890) 43 Ill. App. 370; *Mossa* v. *Mossa* (N. Y. 1908) 123 App. Div. 400, and one court has even held that the wife is justified in refusing to live near the husband's relatives. *Powell* v. *Powell* (1856) 29 Vt. 148. Although this qualification may be a marked deviation from the common law rule, see 1 Nelson, Divorce & Separation, § 68, and, perhaps, goes a step too far in this matter, yet the decision in the principal case seems to be quite in accordance with the policy of the modern courts pertaining to married women, and in effect, both just and salutary.

Insurance—Change of Risk Between Application and Acceptance—Duty to Communicate.—An applicant for life insurance failed to notify the company of an attack of renal colic which he suffered between the date of the application for the policy and its delivery. *Held,* such failure constituted a fraud which avoids the policy. *Harris* v. *Security Mutual Life Ins. Co.* (Tenn. 1914) 170 S. W. 474.

Concealment of material facts coming to the knowledge of an applicant for insurance after the application, and before its acceptance is generally held to avoid an insurance contract, *Piedmont etc. Ins. Co.* v. *Ewing* (1875) 92 U. S. 377; *Carleton* v. *Patron's etc. Ins. Co.* (1912) 109 Me. 79; *Whitley* v. *Piedmont etc. Ins. Co.* (1874) 71 N. C. 480, but it is to be borne in mind that such acceptance may antedate the issuance of the policy. 1 May, Insurance (4th ed.) § 191; Vance, Insurance, § 95; but see *Merchant's etc. Ins. Co.* v. *Lyman* (1872) 82 U. S. 664. There is some authority for the view that an insurance company issuing a policy in reliance upon representations which it knows to have been made some time before, assumes the risk of a subsequent change in conditions. *Day* v. *Hawkeye Ins. Co.* (1887) 72 Iowa 597; *Insurance Co.* v. *Higginbotham* (1877) 95 U. S. 380. The better position, however, would seem to be that until the consummation of the contract there is a continuing representation that the statements

in the application are true. 1 May, Insurance (4th ed.) § 190. Since the facts are peculiarly within the knowledge of the applicant and difficult for the insurer to ascertain, the parties can hardly be said to deal at arm's length, *Equitable Life Assurance Soc.* v. *McElroy* (C. C. A. 1897) 83 Fed. 631, and the principal case is therefore correct in holding that one who obtains insurance by silence as to a material change of circumstances since his application, is guilty of such fraud as to vitiate the contract.

Intoxicating Liquors—Issuance of License—Consent of Infant Residence Owners.—A statute required that a petition for a license to sell intoxicating liquors be accompanied by the consent of two-thirds of the residence owners within 300 feet of the proposed site. The petitioner's application contained among the required number of consents that of two infant residence owners. *Held,* since the consent of these infants was not valid the application was insufficient. *In re Farley* (N. Y. 1914) 106 N. E. 756.

The contracts of an infant are not valid and binding, but are voidable by him within a reasonable time after he reaches majority, Pollock, Contracts (8th ed.) 56, 58; 11 Columbia Law Rev. 468, and while the early rule was that an infant's act of appointing an agent was absolutely void, Mechem, Agency, §§ 51, 52, the more recent doctrine is that the act of appointing the agent is not void and that an infant may contract voidably through an agent as well as in person. Huffcut, Agency (2nd ed.) § 15. In cases where an infant contracts concerning his property or rights either through an agent or for himself the infant is the only one who would suffer through his lack of discretion, were the contracts enforcible against him. In the principal case, however, an entirely different situation is presented. The location of a liquor store affects no one consenting party alone, but the entire neighborhood. If valid, an infant's consent might be the determining element, and if it were merely voidable it might have the same effect temporarily. Accordingly, in the only two previous cases where the question has come before the courts, it has been held that infants are not competent to pass upon such a subject. *Thompson* v. *Eagan* (1903) 70 Neb. 169; *People* v. *Griesbach* (1904) 211 Ill. 35, and what an infant may not do himself he could not do by an agent.

Landlord and Tenant—Lease After Mortgage—Attornment to Mortgagee.—The plaintiff brought suit upon a lease in writing for rent accruing since the demised premises were sold in foreclosure proceedings under a mortgage he had given before the execution of the lease. The defendant pleads attornment and payment to the mortgagee after the latter had purchased at foreclosure but before he received the deed. *Held,* the plaintiff cannot recover. *Hinck* v. *Cohn* (N. J. 1914) 92 Atl. 378.

The time at which a mortgagee may secure possession of the mortgaged premises has varied with development of our law. Originally, in the absence of any agreement to the contrary, he could bring ejectment for them whenever he pleased. See *Green* v. *Kemp* (1816) 13 Mass. 515. In some jurisdictions he is still entitled to possession of the land after default. *Shields* v. *Lozear* (1869) 34 N. J. L. 496. In others the right is denied to him entirely unless he has already entered into possession with the consent of the mortgagor. See *Barson* v. *Mulligan* (1908) 191 N. Y. 306; N. Y. Code Civ. Proc., § 1498. When,

however, the right to possession does vest in a mortgagee or one claiming through him, or in a purchaser at the sale, such person may then eject either the mortgagor or one to whom the latter has leased the premises since giving the mortgage. See *Knowles* v. *Maynard* (Mass. 1847) 13 Metc. 352; *Western Union Tel. Co.* v. *Ann Arbor R. R.* (1898) 61 U. S. App. 741. A tenant may plead in defence to a suit for rent by the mortgagor that he has thus been evicted by paramount title. *Simers* v. *Saltus* (N. Y. 1846) 3 Den. 214. He may also show, that to avoid actual eviction by the one who was entitled to immediate possession he attorned to him, *Smith* v. *Shepard* (Mass. 1833) 15 Pick. 147, for he then in fact proves that he has been constructively evicted. *Jones* v. *Clark* (N. Y. 1822) 20 Johns. *51; *Anderson* v. *Robbins* (1890) 82 Me. 422; I Tiffany, Landlord and Tenant, § 73. In the principal case there was some question as to whether attornment to the mortgagee had been properly pleaded; assuming that it had, the case is clearly sound, for in New Jersey a mortgagee has the right to possession immediately upon default. See *Mershon* v. *Castree* (1895) 57 N. J. L. 484.

Landlord and Tenant—Married Women's Acts—Lease as Conveyance or Incumbrance.—A married woman leased her separate real property without her husband's consent. The Statute providing that no married woman should convey or encumber her separate real estate except by deed in which her husband should join, was *held* not to invalidate the lease. *Spiro* v. *Robertson* (Ind. App. 1914) 106 N. E. 726. See Notes, p. 265.

Landlord and Tenant—Waste Committed by Stranger—Tenant's Damages.—A life tenant sued for the defendant's negligence in setting fire to the premises. *Held,* he could recover for all damages, both to the life estate and to the inheritance, although he would not be liable to the remainderman for the defendant's act. *Rogers* v. *Atlantic, Gulf & Pacific Co.* (1915) 213 N. Y. 246. See Notes, p. 253.

Libel and Slander—Application for Pardon—Privilege.—The defendant, an attorney, in an application to the governor for a pardon for his client charged the plaintiff who was instrumental in bringing about the conviction as being an "unprincipled, blackmailing, depraved scoundrel". *Held,* since the charge was irrelevant, it was not protected by the absolute privilege of the occasion. *Andrews* v. *Gardner* (N. Y. App. Div. 1914) 150 N. Y. Supp. 891.

The rule adopted by the English court as to privilege is that if the privilege of the occasion is absolute, no statement made upon such an occasion can be questioned. In this country, however, the use of the term absolute occasion is misleading, since the courts generally follow the early English cases, holding that although irrelevant as well as relevant communications may be protected by such privileged occasion, yet if the statements are irrelevant they are only conditionally privileged. 9 Columbia Law Rev. 600. Under the English rule, therefore, the assumption made by the court in the principal case that an application for a pardon furnishes an absolute privilege, *Connellee* v. *Blanton* (Tex. 1914) 163 S. W. 404, would defeat the plaintiff's claim. If, on the other hand, under the circumstances of a petition for a pardon to the governor, the occasion is said to be conditionally or qualifiedly privileged, it will not serve as a blanket

protection for wholly irrelevant statements. In such a case, a communication is privileged and protected by the occasion only when relevant thereto. Odgers, Libel & Slander (5th ed.) 304; *Moore* v. *Manufacturers' Nat. Bank* (1890) 123 N. Y. 420, 427; *Robinett* v. *Ruby* (1858) 13 Md. 95. There can be little doubt that certain communications would be irrelevant and immaterial if made in judicial proceedings, while they would be very effective in an appeal to the clemency of the governor whose pardoning power is uncontrolled. This, indeed, might be a reason for the adoption of a liberal view by the court as to what is relevant on such an occasion, but as was said in the principal case, it should be assumed that the governor "would not be moved by mere caprice or purely quixotic considerations," although, in the light of recent history, such assumption may be contrary to the facts. The governor may have the power to act on any consideration, but surely his right is morally limited by his duty to the State.

Libel and Slander—Imputing Negro Blood to White Persons—When Actionable.—The defendant circulated untrue oral reports that the plaintiff and his family were negroes, which resulted in the exclusion of the plaintiff's children from white-school privileges. *Held*, such conduct is actionable. *Spencer* v. *Looney* (Va. 1914) 82 S. E. 745.

Since the plaintiff in the principal case proved special damage, to hold the words actionable was clearly correct. But since the courts have been unwilling to enlarge the category of oral words actionable *per se* beyond its common-law limitations, see *Williams* v. *Riddle* (1911) 145 Ky. 459, even in the face of tempting opportunity, see *Pollard* v. *Lyon* (1875) 91 U. S. 225, allegations imputing negro blood to whites are generally not actionable *per se*, even in the southern States. Newell, Slander & Libel (3rd ed.) 99, n. 14; *Williams* v. *Riddle*, *supra*; *McDowell* v. *Bowles* (1860) 53 N. C. 184; *Barrett* v. *Jarvis* (Ohio 1818) 1 Tappan 244; *Johnson* v. *Brown* (1832) 4 Cranch. C. C. 235. In South Carolina and Louisiana, however, it is unnecessary to show special damages to establish a cause of action, even when such objectionable remarks are oral; but this result is achieved in the latter jurisdiction only by straining a local code provision. *Eden* v. *Legare* (S. C. 1791) 1 Bay 171; *King* v. *Wood* (S. C. 1818) 1 Nott. & M. 184; *Spotorno* v. *Fourichon* (1888) 40 La. Ann. 423. Since courts deal more sternly with false allegations made in written form, see *Williams* v. *Riddle*, *supra*, it is not surprising to find that in these two jurisdictions written assertions of this nature are actionable without proof of special damage. *Flood* v. *News & Courier Co.* (1904) 71 S. C. 112; *Upton* v. *Times Democrat Pub. Co.* (1900) 104 La. 141. These latter cases are clearly correct on principle, since the false written statements tend to subject the victim to the hatred, ridicule or contempt of a considerable portion of the community and to promote breaches of the peace. The defendant, however, should be permitted to show proof of immediate printed retraction and apology, in mitigation of damages. *Cf. Upton* v. *Times-Democrat Pub. Co.*, *supra*.

Parent and Child—Duty of Child to Pay Burial Expenses of Indigent Parent.—On objection by an infant's special guardian, to a charge by the general guardian for burial expenses of the infant's mother, *held*, the charge is allowable, since equity thus enforces the

moral duty of an infant to support or bury an indigent parent. *In re Connolly's Estate* (1914) 150 N. Y. Supp. 559.

Though at common law a child was under no obligation to support an indigent parent, *Becker* v. *Gibson* (1880) 70 Ind. 239; 2 Kent, Comm. *208; see *Dominus Rex* v. *Munden* (1718) 1 Str. 190, such a duty was imposed by Statute, 43 Eliz. c. 5, and by similar enactments in this country. On principle it would seem that a recovery in quasi-contract might be allowed against a child whose statutory duty has been discharged by another, since the child is unjustly enriched to that extent, but it is held that the duty can be enforced only by statutory procedure. *Edwards* v. *Davis* (N. Y. 1819) 16 Johns. 281; *Duffy* v. *Yordi* (1906) 149 Cal. 140. The court in the principal case admits that the New York Statute on this point has been repealed, but rests its decision on precedents in equity. In determining the amount to be allowed for the support of an infant, courts of equity have granted to an eldest son enough to enable him suitably to support his younger brothers and sisters, *Wellsley* v. *Duke of Beaufort* (1827) 2 Russ. *1, *28; *Petre* v. *Petre* (1747) 3 Atk. *511; see *Lanoy* v. *Duke of Athol* (1742) 2 Atk. *444, *447, and even to maintain an illegitimate brother; *Bradshaw* v. *Bradshaw* (1820) 1 J. & W. Ch. *627; and in a few cases allowance has been made for the support of indigent parents. *Roach* v. *Garvan* (1848) 1 Ves. Sr. 157, 160; *Heysham* v. *Heysham* (1785) 1 Cox. Eq. 179; *cf. Matter of Bostwick* (N. Y. 1819) 4 Johns. Ch. 100, 105. Such expenditures are considered as made for the proper maintenance and advancement of the infant himself, since it is to his interest to have his family suitably supported. *Allen* v. *Coster* (1839) 1 Beav. *202. Since burial expenses are analogous to support, the doctrine of the principal case, though perhaps influenced by the smallness of the amount in question, and the fact that the expense had been already incurred, is supported on this ground by authority, and is commendable in its incidental enforcement of one of the most sacred duties of filial respect.

Pleading and Practice—New York Code of Civil Procedure—Suits by Non-Resident Against a Foreign Corporation Under § 1780.—A foreign corporation, doing business in New York State, brought suit in the Supreme Court against a foreign corporation not engaged in business within the State. *Held,* the court had no jurisdiction of the action. *United States Asphalt Refining Co.* v. *Comptoir Nationale d' Escompte de Paris* (N. Y. App. Div. 1915) 52 N. Y. L. J. 113.

By § 1780 of the Code of Civil Procedure, the legislature has limited the right of a non-resident to sue a foreign corporation to certain specified instances. The jurisdiction of the New York courts over such suits was enlarged in 1913 by the addition of subdivision 4 to § 1780, which provided that "an action against a foreign corporation may be maintained by another foreign corporation or by a non-resident. * * * 4. Where a foreign corporation is doing business within the State." Since § 1779 provides under what circumstances a foreign corporation may sue, and since § 1780 is entitled "When a foreign corporation may be sued," the court in the principal case was clearly justified in deciding that the words "a foreign corporation" were limited in their application to the defendant, and that the fact that the plaintiff was engaged in business within the State did not suffice to give the court jurisdiction.

PUBLIC SERVICE CORPORATIONS—TELEGRAPHS AND TELEPHONES—EXCLUSIVE CONTRACTS RESULTING IN MONOPOLY—PUBLIC POLICY.—A contract between a railroad and a telegraph company by which the latter was given the exclusive right to construct and operate telegraph lines along the right of way, was *held* contrary to public policy and void. *Western Union Tel. Co.* v. *Postal Tel. Co.* (C. C. A. 1914) 217 Fed. 533.

Under federal statutes, sustained by liberal interpretation of constitutional provisions, any telegraph company desiring to construct a telegraph line along a railroad right of way is entitled, subject to certain limitations, to do so. U. S. Const., Art. 1, § 8, subd. 3 & 7; U. S. Rev. Stat. § 3964; U. S. Rev. Stat. § 5263; see *Pensacola Tel. Co.* v. *W. U. Tel. Co.* (1877) 96 U. S. 1. Contracts such as that set up by the appellant are invariably declared invalid by the courts, federal and State alike, usually both as in restraint of trade and as in contravention of the statutes. See *W. U. Tel. Co.* v. *American U. Tel. Co.* (U. S. 1879) 9 Bis. 72; *W. U. Tel. Co.* v. *Burlington etc. Ry.* (1882) 11 Fed. 1; *Union Trust Co.* v. *Postal Tel. Cable Co.* (1895) 8 N. Mex. 327; *W. U. Tel. Co.* v. *American U. Tel. Co.* (1880) 65 Ga. 160. In the federal courts, however, it seems unnecessary to go behind the statute, which is clearly hostile to monopoly, U. S. Rev. Stat. § 5263; *W. U. Tel. Co.* v. *Baltimore etc. Tel. Co.* (1884) 19 Fed. 660; and any State enactment attempting to confer exclusive privileges upon a single company will be declared inoperative. *Pensacola Tel Co.* v. *W. U. Tel. Co., supra.* According to modern economic theory the telegraph is a natural monopoly, and it is thought that the public will be served better by a single company controlling all the facilities than by competition. See Hadley, Economics, § 168; Seager, Introduction to Economics (3d ed.) § 251. But the law, regarding monopoly as dangerous to the public welfare, has, broadly speaking, generally favored competition, even at the cost of its inevitably concurrent economic factor, duplication of capital. See Wyman, Control of the Market, ch. 6 & 8. Certainly, it would be improper to permit one company to call upon the courts to assist in the strangulation of a competitor by enforcing discriminatory contracts or by justifying other questionable methods, no matter how desirable the result to those accepting the newer economic theory.

REAL PROPERTY—POSSIBILITY OF REVERTER—CHARITABLE TRUSTS.—Trustees of land donated for charitable purposes sold it to a railroad to avoid condemnation, and reinvested the proceeds in other property to be similarly used. The heirs of the original donor claimed the land reverted to them because of the sale. *Held,* it did not revert, but the heirs had reversionary rights in the new property purchased by the trustees. *Lutes* v. *Louisville & N. R. R.* (Ky. 1914) 164 S. W. 792.

An estate upon collateral limitation reverts to the grantor or his heirs upon the happening of the event which terminates the estate. Gray, Perpetuities (3rd ed.) § 13. But the courts generally construe grants for charitable purposes as creating charitable trusts or the restrictions concerning their use as operating only as covenants, and do not allow the property to revert unless the donor expressly stipulated that it should. 2 Perry, Trusts (6th ed.) § 744; *Strong* v. *Doty* (1873) 32 Wis. 381; *Griffitts* v. *Cope* (1851) 17 Pa. 96; see note, 19,

L. R. A. 263. The trustees of such property, moreover, may sell it if they are authorized to do so by the legislature, *Petition of Van Horne* (1893) 18 R. I. 389; *Littell* v. *Wallace* (1882) 80 Ky. 252, or permitted by a court of equity. *Bridgeport Library* v. *Burroughs Home* (1912) 85 Conn. 309; see note, Gray, Perpetuities (3rd ed.) 472. In the jurisdiction of the principal case property donated for charitable purposes, if no longer used for the specified purpose, reverts even in the absence of an express provision, *Grundy* v. *Neal* (1912) 147 Ky. 729, and an unauthorized contract to sell is sufficient diversion from the purpose specified. *Trustees of Presbyterian Church* v. *Alexander* (Ky. 1898) 46 S. W. 503. Since no permission to sell had been obtained in the principal case the property would, under the Kentucky law, seem to revert, and since the plaintiffs were neither the grantors nor the heirs of the grantor of the estate purchased with the proceeds of the land originally donated, there is no authority for giving them a possibility of reverter in that estate.

Real Property—Tenancy by the Entirety—Effect of Divorce.—The plaintiff, claiming through the divorced husband of the defendant, asks for partition of lands which had been held by the latter in entirety with the plaintiff's grantor. *Held,* the divorce converted the tenancy by entirety to a tenancy in common, and the plaintiff is therefore entitled to partition. *McKinnon, Currie & Co.* v. *Caulk* (N. C. 1914) 83 S. E. 559.

It has been held in a few jurisdictions that a divorce has no effect on a tenancy by the entirety because the quality of the estate is determined at its inception and should no more be affected by a subsequent severance of the marriage relation than is an estate already existent affected by the creation of the same. *Alles* v. *Lyon* (1907) 216 Pa. 604. To this reason has been added a reluctance to see the party at fault profit by his or her own wrong. *In re Lewis* (1891) 85 Mich. 340. But the only reason that a man and wife do not take by moities is that while the coverture lasts they are in the eye of the law but one. *Russell* v. *Russell* (1894) 122 Mo. 235. A decree of divorce, therefore, which destroys their artificial identification removes the only barrier to their holding individual interests in the land, and enables the conveyance then to have its full effect. *Harrer* v. *Wallner* (1875) 80 Ill. 197. Accordingly, a decree of divorce leaves the parties to hold by whatever form of co-tenancy the particular law of their jurisdiction would have placed them in at the start. See *Enyeart* v. *Kepler* (1888) 118 Ind. 34. The common law favored joint tenancy and in the absence of statute abolishing it words apt for its creation will govern after divorce. *Thornley* v. *Thornley* L. R. [1893] 2 Ch. 229; *Lash* v. *Lash* (1877) 58 Ind. 526. To-day, however, in view of the statutory disfavor in which that form of co-tenancy has fallen, a divorce almost universally makes the parties tenants in common. *Stelz* v. *Schreck* (1891) 128 N. Y. 263; *Hayes* v. *Horton* (1905) 46 Or. 597.

Specific Performance—Rents Profits and Interest.—In May, 1906, an option for the sale of land was accepted, and in March, 1912, the vendor, after years of litigation, was finally awarded title to the property by a judicial decision. In May, 1913, the vendee paid the purchase price into court, and notified the seller of the fact. In a suit for specific performance by the vendor, it was *held* that the purchaser

must pay interest on the purchase price from March, 1912, until May, 1913. *Wilson* v. *Seybold* (D. C. W. Va. 1914) 216 Fed. 975. See Notes, p. 256.

STATUTES—EXAMINATION OF JOURNALS TO IMPEACH VALIDITY OF ENROLLED BILL.—Mandamus was brought to compel election commissioners to proceed under an old statute on the ground that the one repealing it did not pass the legislature by a majority vote. The journal, which was required by constitution to record the yeas and nays, stated that a number amounting to a majority voted in favor of the statute but showed a list voting "yea" less in number. *Held,* the act was invalid, since the journals proved that it was not constitutionally passed. *State ex rel. Schmoll* v. *Drabelle* (Mo. 1914) 170 S. W. 465.

The duty of the courts to pass on the constitutionality of legislative acts has been interpreted in many jurisdictions to include the necessity of looking behind enrolled bills to see that the legislators have, in their procedure, complied with constitutional requirements. *Opinion of the Justices* (1858) 35 N. H. 579; *Rode* v. *Phelps* (1890) 80 Mich. 598; *State* v. *Nashville Baseball Club* (1913) 127 Tenn. 292. But the opposite view has been taken in a very strong line of decisions, which refuse to subject a law, publicly proclaimed and acted upon, to the danger of being undermined by evidence from a carelessly compiled journal. *Pacific R. R.* v. *Governor* (1856) 23 Mo. 353; *Ex parte Wrenn* (1886) 63 Miss. 512; *State* v. *Wheeler* (1909) 172 Ind. 578. The better reasoned cases recognize the judicial duty to see that constitutional requirements are observed, but accept the solemn assurance of the governor and presiding officers of the legislature as unimpeachable evidence of the proceedings of the co-ordinate branches of government. *Field* v. *Clark* (1892) 143 U. S. 649; *Lafferty* v. *Huffman* (1896) 99 Ky. 80; *Atlantic Coast Line R. R.* v. *State* (1910) 135 Ga. 545. Even the decisions upon which the decision in the principal case is based, recognize a strong presumption in favor of the regularity of the enrolled bill, which would not be sufficiently rebutted by doubtful evidence in the journal. *State* v. *Frank* (1901) 61 Neb. 679; *Missouri etc. Ry.* v. *Simons* (1907) 75 Kan. 130; *Goff* v. *Rickerson* (1911) 61 Fla. 29. The principal case, in allowing conflicting evidence from the journals to impeach an enrolled bill, seems to give very little weight to this presumption.

TAXATION—NOTES AND MORTGAGES—SITUS FOR PURPOSES OF INHERITANCE TAX.—A resident of Florida carried on a loaning business in Iowa in charge of a local agent who, a few days before his principal's death, removed certain notes and mortgages on Iowa land securing them to Wisconsin, where they remained until after her death. *Held,* these notes and mortgages were taxable in Iowa, since they were constructively within the State, and had a business situs there. *In re Adams' Estate* (Iowa 1914) 149 N. W. 531.

Because of the doctrine *mobilia sequuntur personam,* the State in which a decedent was domiciled may tax all of his personal property regardless of its actual situs. *Gallup's Appeal* (1904) 76 Conn. 617; see *Blackstone* v. *Miller* (1903) 188 U. S. 189. The only difficulty arises when a State seeks to tax the personal property of a person not domiciled within it, and under such circumstances various rules

have been announced. Where securities or evidences of indebtedness are physically within the jurisdiction they are taxable as property, irrespective of the owner's domicile. *Matter of Romaine* (1891) 127 N. Y. 80; *Lewis's Estate* (1902) 203 Pa. 211; *In re Stanton's Estate* (1905) 142 Mich. 491. Where such documents are owned by a non-resident and are actually outside of the State, although they evidence rights against residents, there is a diversity of opinion. On the one hand it is held that there is nothing within the State which is taxable, *Matter of Bronson* (1896) 150 N. Y. 1; *Gilbertson* v. *Oliver* (1906) 129 Ia. 568; *Matter of Preston* (N. Y. 1902) 75 App. Div. 250, for the residence of the obligor gives no situs to the property. And on the other hand, it is held, that since the foreign owner must resort to domestic courts to enforce his rights, the protection accorded by the State renders the property amenable to taxation. *In re Merriam's Estate* (1907) 147 Mich. 630; *In re Rogers' Estate* (1907) 149 Mich. 305; *cf. Matter of Houdayer* (1896) 150 N. Y. 37. On the same ground, it is held that where credits are acquired within a State in the course of a business habitually carried on there they are taxable in the State of their origin without reference to the domicile of the creditor or the actual situs of the evidences of indebtedness. *Metropolitan Life Ins. Co.* v. *New Orleans* (1907) 205 U. S. 395; *Bristol* v. *Washington County* (1900) 177 U. S. 133. It is on the second theory, that of protection, that the principal case must rest, and on that ground it is perfectly sound.

Taxation—War Revenue—Exports.—Suit was brought to recover money paid under the War Revenue Act of 1898, (30 U. S. Stat. L. 461), levying a tax on all policies of insurance including marine insurance, on the ground that the tax was unconstitutional. *Held,* since the charge did not amount to a tax on exports, it did not violate Art. 1, § 9 of the Constitution. *Thames & Mersey Marine Ins. Co.* v. *United States* (D. C. S. D. N. Y. 1914) 217 Fed. 683.

The provision in this statute putting a tax on charter parties was *held* to be to that extent unconstitutional, in that it imposed a tax on exports in violation of Article 1, § 9 of the Constitution. *Hvoslet* v. *United States* (D. C. S. D. N. Y. 1914) 217 Fed. 680.

Taxes which apply to property and manufactures generally are not invalid, merely because some of the articles are later exported. *Pace* v. *Burgess* (1875) 92 U. S. 372; *Cornell* v. *Coyne* (1904) 192 U. S. 418, 429. On the other hand, a tax is not constitutional if it really imposes a duty on exports, although it does so indirectly. Consequently the prohibition in Article 1, § 9 has been extended to include not only the goods themselves, but also the documents pertaining to their carriage. Taxes on bills of lading and warehouse receipts have accordingly been declared invalid. *Fairbank* v. *United States* (1901) 181 U. S. 283, 295; *Selliger* v. *Kentucky* (1909) 213 U. S. 200, 207. It is to this class that the second principal case belongs, and the decision seems clearly correct on principle and authority. It is difficult to see why the same reasoning would not apply as well to policies of marine insurance as to charter parties. Of course it may be urged that since the Supreme Court has consistently declared that insurance policies are not articles of interstate commerce, see *New York Life Ins. Co.* v. *Deer Lodge County* (1913) 231 U. S. 495; *Hooper* v. *California* (1895) 155 U. S. 648; *Paul* v. *Virginia* (1868) 8 Wall. 168, they

cannot be classed as exports. But even if the policies are not all exports, a tax on marine insurance policies would nevertheless seem to be void for the reason that it is an attempt indirectly to impose a tax upon the insured articles which are exported.

WILLS—FORM—EXTRINSIC EVIDENCE TO ESTABLISH AN INSTRUMENT AS A WILL.—The proponent offered for probate as a will, an envelope and two papers enclosed. Nothing appeared upon the face of the papers to show that they were executed with a testamentary intent. *Held*, parol evidence was inadmissible to show that the deceased intended the papers to operate as his will. *Maris* v. *Adams* (Tex. 1914) 166 S. W. 475. See Notes, p. 258.

BOOK REVIEWS.

EUGENE UNTERMYER, *Editor-in-Charge.*

MANUAL OF FEDERAL PROCEDURE. By CHARLES C. MONTGOMERY. San Francisco: BANCROFT-WHITNEY CO. 1914. pp. viii, 1057.

"Generally speaking" says the author, "the place of our Federal Courts in our two-fold judicial system—Federal and State—is (1) to give uniformity and national dignity to the determination of Federal or national questions, and (2) to furnish impartial tribunals in cases of diverse citizenship" (p. 2). A special study of Federal procedure is necessary, he says, because, as to suits in equity, we are given "a complete, separate system differing in many vital particulars from state systems", and, with respect to an action at law, "the Federal practitioner must search out those matters wherein the Federal statutes, court rules and decisions have changed the mode of procedure from that in the State Court" (pp. 9-10). With this outline, the work develops into a discussion of the practice in our national courts of law and equity.

A manual it is, and it does not profess to be more. With that standard of its excellence, it bears the test well. It is a very fair summary of a most difficult and perplexing subject; and when in the hands of one who is generally familiar with the workings of the Federal jurisdiction, it will always have a distinct use. The arrangement of subject matter is excellent. This is particularly true in regard to the numerous recent Federal Statutes on various substantive points; so far from being ignored, as might have been expected, they are arranged, as to all questions of procedure for enforcing their provisions, under appropriate headings. A good instance is Section 211, "Jurisdiction under Income Tax Law", and another is Section 212, which refers to arbitration between common carriers and their employees under the Act of July 15, 1913. The different aspects of the appellate jurisdiction of the Supreme Court and of the Circuit Courts of Appeals are well illuminated. Many other excellences there are, and we venture to repeat the commendation of the book for what it purports to be, a summary, and nothing more, and, as a summary, of considerable value to the practitioner who already knows something about the subject.

The book has not yet appeared which does more than give us the practice of the Federal Courts; the philosophy of their being, in its present day lights, is yet to be unfolded. It is an anomolous situation that we have; no other nation has anything like it. The origin of our national judicial system undoubtedly was as stated by the author in the quoted passage with which this review opens, but, like many of the other ideas with which the National Constitution was launched, time has worked such changes that the part originally appointed for the Federal Courts has been greatly altered.

For example, the determination of Federal questions still remains, in the last analysis, for the Supreme Court; but, so far from such cases reaching it by way of appeal from the lower Federal Courts, they may just as well come up from the State tribunals. Thus Chief Justice Marshall decided in *Cohens* v. *Virginia* (1821) 6 Wheat. 264, and since his time the majority of constitutional cases have reached the Supreme Court by that way.

Again, the Federal Courts of first instance were devised to furnish impartial tribunals for non-residents, whether aliens or citizens of other states; but the experience of non-resident litigants in the Federal Courts sitting in some of our Southern states after the Civil War and until comparatively recent days, led many counsel for foreign plaintiffs deliberately to choose the State Courts in such regions as preferable in respect to certain essentials of justice if not of the Byzantine. That unhappy period has disappeared, but it had its use for purposes of illustration.

In the average American state of to-day, the local Federal Court is not apt to be chosen in preference to the State tribunal because of the certainty of finding an impartial judge in the halls of the one rather than of the other. Counsel for the foreign plaintiff is rather more concerned with finding the ablest judge. In this respect, there is no uniform rule in operation; in one State the local Federal bench may rank far above that of the State within whose bounds it sits, and in another State there may be no choice, or indeed the comparison may be in favor of the State courts. More important still in the choice of forum are the considerations that the nature of his case must present to counsel. If the presentation of his proofs will raise a point of evidence on which the Federal doctrine differs from that of the State,—and there are such points—or a question of "general commercial law" on which the Federal rule is at variance with the pronouncement of the State courts, then the practitioner will choose that jurisdiction whose doctrine favors his case as it will develop on the trial.

These instances show how far we have travelled from the ideas of our fathers, who with Eighteenth Century pragmatism gave us a novel institution to subserve one purpose alone. To-day the original purpose is obscured by a thousand chance considerations of daily occurrence, yet we, being people of the common law, have not abolished the institution which long ago lost its *raison d'etre*. If Professor Montgomery will supplement his very practical manual with discussion of the relative place of our national Courts, as distinct from the operations of their machinery, he will have given something to the student as well as to the practitioner.

Garrard Glenn.

THE PROCEDURE AND LAW OF SURROGATES' COURTS OF THE STATE OF NEW YORK. By WILLIS E. HEATON. Third Edition. Albany: MATTHEW BENDER & Co. 1914. pp. Vol. I, cxix, 1025. Vol. II, xliii, 974.

The present edition of this work has been published on account of the passage of Chapter 443, of the Laws of New York, 1914, entitled "An Act to amend the code of civil procedure, in relation to surrogates and the practice and procedure in surrogates' courts", which act is a revision of the entire Chapter XVIII, relating to these topics, and is the result of the report of commissioners, originally constituting a revision committee of the New York State Surrogates' Association; and, apparently made state appointees by a provision in the appropriation law of 1912 (Chap. 547). The author was for a number of years surrogate of Rensselaer county, was the first chairman of the revision commission, and was thereafter special counsel of the commission, and, as he states, was entrusted with the principal part of the work of revision, and of formulating the new practice, and he should, therefore, be qualified to state what changes were proposed to be effected by the

revision and the reasons for those changes; and his views on these points are expressed in the present edition. This is not the place to consider carefully the merits and demerits of the revision, but it may be said that one of the main purposes thereof appears to have been to increase the jurisdiction of the surrogates' courts, and the power of the surrogates; that the changes made in the procedure are many and important; that some of these changes are undoubtedly advantageous; that the desirability and even the constitutionality of others are, at least, questionable; and that it is by no means certain that the views adopted by the courts with reference thereto will be those expressed in these volumes by the author.

In expressing an opinion upon the merits of the work under consideration it is only fair to bear in mind the author's purpose and plan as declared in his introduction to the first edition, and which have been followed in the present edition. He there states that the work is the "outgrowth of the practical work" in transacting the large business coming to his court; is prepared from classified memoranda of the cases examined during the conduct of this business, which material he hopes will be as useful to the practitioner as it has been to the author; and that "the citations from the cases have been used quite generally in their detached form, with the result that the text may have lost smoothness; but that is better than that the busy lawyer should lose time."

Naturally, a work thus prepared cannot be compared with such a well-known and highly esteemed general treatise as Woerner's Law of American Administration, nor even with several works which might be named and which are limited to the consideration of New York law upon these subjects. What we find is not really the work of an author, but of an editor. It is a compilation. The existing code sections are given in full, with explanation of the changes from former sections when such changes have been made; these are supplemented by insertion of sections from the Decedent Estate Law, Domestic Relations Law, and other statutes where such insertion is needed to make the application of the code sections clear. In connection with these statutory provisions are given excerpts from judicial opinions relating to the topics under consideration; although, unfortunately, there will quite frequently be found, on succeeding pages, extracts from opinions which apparently are flatly contradictory, nothing appearing in the text to indicate that either some change in the statutory law or some marked difference in the facts involved, furnishes a complete explanation of the seemingly conflicting decisions.

There is a large collection of "forms" covering all proceedings likely to be taken, and the index seems to be sufficiently full to render the contents of the volumes easily available.

There is not in the entire work any conspicuous evidence of very thorough knowledge of the history of the origin, procedure, and development of the surrogates' courts of New York, or the courts of other states exercising similar jurisdiction; and, as already indicated, one who desires some systematic and enlightening treatment of these topics, or any intelligent and helpful discussion of the decisions relating thereto, will not always find satisfaction in these two bulky volumes.

On the other hand, Mr. Heaton's actual experience as a surrogate, extending over a period of more than ten years, has given him exceptional opportunities for learning the needs of the profession in this department of law, and if we adopt his view that the purpose of such

a book should be to prevent a busy lawyer from losing time, instead of assisting him to a complete knowledge of the subject, it may readily be conceded that the present work seems to be well adapted for the accomplishment of that purpose.

Henry S. Redfield.

A Selection of Cases on the Law of Insurance. By George Richards. Second Edition. New York: The Banks Law Publishing Co. 1913. pp. xix, 453.

This work is something more than a case book. To those who are accustomed to the form of collections exemplified in the compilations made in different branches of the law by the late Prof. Keener, Mr. Richards' book will come as a distinct revelation. Types of case books may be divided roughly into two classes. In the first class, the case is practically reprinted verbatim from the original report, with the facts set out at length, sometimes almost *ad nauseam*, followed in due course by the opinion or opinions of the court. To persons beginning the study of law, this form of case book is of the greatest value. The student is taught to pick out the facts of real importance, to winnow the wheat from the chaff, and, so long as the work has not been too extensively annotated by the very frequent predecessor in possession, to draw his own conclusions concerning the correctness of the decision. In the first year's work at any of our modern law schools the vital purpose is to instruct the legal aspirant in the handling of his instruments, and the amount of actual law absorbed is of relatively little importance. The first class of case book is therefore invaluable to instruct the student in the fundamental problem of the lawyer's work, which is to deal with facts so as to be able to understand the cases as actually reported.

As the law student gets on in his investigations, however, he becomes acquainted with the bases of his profession, so that by the time he enters upon his last year of study, he should be to some degree, the master of his tools. The Bar Examinations of his native State loom up with dreadful reality, bristling with questions about the law as it stands, and contemptuously disregarding the reasoning powers of the applicant. He wishes to learn as much law as he can, and it is then that the second class of case book becomes exceedingly useful. While it does not relieve the student of the necessity of using his reasoning powers, this type of case book, of which Mr. Richards' work is a shining example, does assist the reader in saving a great deal of time which he formerly spent puzzling over a multitude of often irrelevant facts. Following the example of Professor Ames, the present author has frequently cut down the original statements, or restated the facts in his own language, but the reasoning of the court is not, of course, in any way altered. Since the subject of Insurance is not usually taken up until near the end of the curriculum, this work should be all the more adaptable for the reasons submitted. The reader can still study from the original sources in the manner of the practitioner, and yet not be compelled to wade through an endless complaint, with pleas to correspond.

The actual cases selected, however, supply a mere skeleton. To fill in this structure the author has outdone even Professor Ames in the volume of his footnotes, which give not only copious citations, but often outline the facts and holding of the case referred to. Another

grateful feature consists in the dates of the principal cases, of which a great majority were decided in very recent times. The volume is of a reasonable size, which is somewhat unusual in case books.

By virtue of the head-notes preceding each group of cases, which sometimes tell the student a bit too much for purposes of inductive reasoning, and because of certain other features, such as a set of different forms of policies with various adjustment clauses, this work adopts certain characteristics of a text-book. A list of 309 questions taken from actual cases, without answers, would seem to be valuable for purposes of review. The subject is adequately covered both in its general theory and in the application of such theory, and the volume should be of value not only for purposes of study, but as a reference book as well.

THE INCOME TAX. By EDWIN R. A. SELIGMAN. Second Edition. New York: THE MACMILLAN COMPANY. 1914. pp. xi, 743.

The first edition of this valuable work appeared before the passage of the federal income-tax law of 1913. In fact, Professor Seligman's advocacy of the income tax in the various papers which were incorporated in his first edition was an important factor in educating the American public to the point where the passage of the Sixteenth Amendment and of the law of 1913 was possible. In the second edition he adds an analysis of this law and a consideration of the Wisconsin law imposing a tax on incomes. Many will agree with his conclusion that the federal law of 1913 is not perfect. His chief criticisms relate to the administrative methods provided for the collection of the tax and to the failure to make any distinction between the rates on earned and on unearned incomes. On the whole, however, he regards the law as an "intelligent and well-considered effort," and "in many respects superior to any other existing income-tax law." He looks forward to the time when "the income tax, improved and amended, will play its important part in bringing about greater justice in American taxation."

THE FUTURE OF WORLD PEACE. By ROGER W. BABSON. Boston: BABSON STATISTICAL ORGANIZATION. 1915. pp. 142.

Since the issue of the present world conflict is essentially commercial, it is most important to give the economic causes of the war the foremost consideration. Perhaps no American is better qualified to deal with this matter than the author, whose great experience in the practical study of the world's industrial and economic problems is known to all. The actual accomplishments of the Hague Tribunal are briefly explained, and an admirable plan suggested to do away with the many limitations of that body. This book is most timely in that it offers a practical solution for permanent peace, and shows what part the United States may play in bringing it about.

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POLITICAL SAFEGUARDS AND JUDICIAL GUARANTIES.

Government still exists primarily for the protection of certain interests of those who are governed. The character of the rights to be protected changes with the social and industrial organization, and rights which under one condition deserve protection, under another must properly give way to the interests of the community at large. In no country has there ever been drawn a hard and fast line separating rights properly individual from matters subject to governmental regulation, and so long as society is dynamic no such line can be drawn. Yet at any one time certain rights may properly be recognized as requiring protection, and with a society as we now know it, the institution of private property and certain individual actions (as freedom of speech, of the press, etc.) may be regarded as such rights. Whether we agree or not as to its precise limits, there should be a sphere of individual action free from governmental control. But the limits of such a sphere are changing and the safeguarding of the interests which now demand protection must not unduly block readjustments rendered necessary by new social and industrial conditions. This is, in effect, the problem presented in connection with the safeguarding of individual rights. Were the same rights at all times specific, permanent and clearly definable, their protection would not be difficult, and their delimitation once for all as free from governmental action would not be improper.

This discussion deals with the safeguarding of individual rights or interests, and it must be borne in mind that each new generation of a growing society re-defines in terms of its own need the limits between individual right and governmental regulation. In the

discussion of individual rights it should also be remembered that what the advocates of individual safeguards ordinarily have in mind is a safeguard of property rather than of personal rights.

Before discussing types of safeguards it will be worth while to consider just what we may mean by constitutional or other safeguards of individual rights. As to this matter there are two distinct points of view. One group of writers claims that the safeguard must be against democracy itself. This view is represented among English authors by Mr. W. S. McKechnie.[1] Mr. McKechnie's argument as to England runs somewhat as follows: The political dominance has passed to the non-property owning classes, who are primarily interested in increased governmental expense, such as that with reference to old age pensions, unemployment insurance, etc. These classes, not paying taxes, but receiving the benefits of taxation, will if in complete control operate the government in their own interests, and in the long run cripple or destroy the propertied classes—the more provident classes of the community. A safeguard of some sort is therefore desirable to protect property from a democratic government. This view is not always on the surface in England and the United States, but is implicit in much of the discussion of the subject.

The argument for safeguards against democracy has some basis. The electorate is primarily interested in tax spending and the interests of the majority are to some extent opposed to the interests of the property-owning classes. So long as governmental issues are political, the members of a minority have the possibility of becoming part of a later majority. But when the issues are industrial, the property-owning classes may become a permanent minority whose interests are not adequately protected by purely political means. And yet such interests in the last resort must depend for protection, not upon artificial barriers which the people themselves may remove, even though with difficulty, but upon the sentiment of those who control the governmental organization.

Another view, more often expressed, is the view that safeguards are necessary to make sure that what is claimed to be popular opinion actually is so. Professor A. V. Dicey represents this view. He says: "A constitutional safeguard means under any form of popular and parliamentary government (such as exists,

[1]The New Democracy and the Constitution (London, John Murray, 1912).

e. g. in England, in the United States, or in France), any law or received custom, which secures that no change in the constitution or the fundamental laws of the country shall take place until it has obtained the permanent assent of the nation."[2]

The two points of view may be simply illustrated: The Prussian three-class system of voting, which gives a predominant influence to the highest taxpayers, may easily be classed as a safeguard against democracy. The theory, still held if not fully effective in England, that no question of fundamental importance shall be determined by Parliament except after a general election in which the matter has been approved by the country, is a safeguard of democracy, not a safeguard against democracy. In this discussion primary attention will be directed to the safeguards which are compatible with the notion of democratic government. The whole tendency has been toward a democratic control, and such a control is in modern governments more, rather than less necessary, when government because of increasing activity is becoming more of an economic or social problem rather than a purely political one. Any limitation which, once imposed, is practically impossible or very difficult to remove, is in fact a limitation against democracy. A safeguard of individual right under a democratic government is one which assures that action, when taken, represents a real popular view—the sober and considered sentiment of the community.

Safeguards of individual right may, for our purposes, be divided into two classes: (1) safeguards or guaranties, whether in a constitution or not, which are not judically enforcible; (2) safeguards or guaranties which are judicially enforcible. Those of the first class may for the purposes of our discussion be called political guaranties, and those of the second class judicial guaranties. A distinction is sometimes made between political guaranties on the one side and constitutional guaranties on the other; but many constitutional guaranties are not judicially enforcible, and the problem of greatest interest is that of guaranties or safeguards not judicially enforcible as against guaranties or safeguards that are judicially enforcible. Using the terms as just defined we may well consider somewhat in detail the two types of safeguards.

[2]Rights of Citizenship, with preface by the Marquess of Landsdowne (London, Warne, 1912) p. 81. A similar view is represented by Mr. A. M. Kales' Unpopular Government in the United States, pp. 193-224.

1. *Political safeguards.*

The political safeguards, or safeguards of which judicial enforcibility does not constitute an essential element, may for convenience be grouped under the following heads:

(1) Suffrage limitations, whether embodied in constitutions or laws. The more limited the suffrage the greater the influence of propertied classes in the result of elections. Somewhat similar to a limited suffrage is the effect of an apportionment of representatives in such a manner as to give greater weight to certain elements in the community.

(2) An upper house based largely on property, hereditary, or upper class interests. Of course the influence of such a house varies with its actual political power, being very great for the German *Bundesrat* and relatively much less important for the British House of Lords since the Parliament Act of 1911.

(3) Checks and balances of government, such as an arrangement that each law shall have obtained the approval of two houses and of the executive. Such machinery constitutes a safeguard upon governmental action, even though the members of both houses and the executive be chosen by the same (and by a democratic) electorate. Of this type of safeguard the governments in the United States furnish perhaps the best example.

(4) Under a government with a legislature elected on a popular basis, the referendum constitutes in the long run a definite check upon the legislature, and one which is likely in many cases to operate in a conservative sense.

(5) A safeguard of a purely political type presents itself in the character of the people themselves. England with a democratic suffrage still keeps the actual conduct of its government in the hands of the aristocratic classes. In France the large number of small property owners leads to a conservatism which is the most effective safeguard of property interests. With respect to this matter there is variation due to social and political organization. "Political power is vested in the mass of citizens; but the mass of citizens, in most countries, are too busy or too indifferent to obtain political knowledge. Hence it arises that their public affairs are still managed for them, and the direction of their public policy really determined by an oligarchy of one kind or another. In

some states, with a wide popular franchise, but an imperfectly developed constitutional system, as in Austria and Germany, it takes the form of a ministry and a civil service under the control of a strong personal monarchy. In the Latin countries it is usually seen in the shape of a powerful, all-pervading bureaucracy. The modern English substitute is found in groups of persons who pay rather more continuous attention to public affairs than the majority of the electors." In England these persons come primarily from the leisure classes. A governing group has usually as large a share in moulding the spirit of a government as has a democratic electorate, although the electorate which has final power may in the long run be expected to assume an increasingly important share in the actual operation of government. In some countries property interests through pecuniary methods maintain a large political control, but such a safeguard of property is one which must in the long run prove ineffective.

(6) A check of some effectiveness is that which comes from guaranties in a written constitution, even though such guaranties are not judicially enforcible. A constitution may be and usually is regarded as of superior authority, even though not judicially enforcible, and this is especially true where the method of constitutional change is more difficult than that of ordinary legislation. So, for example, in Belgium, the non-judicially enforcible constitutional guaranties seem to have something of effectiveness.

(7) Although no effective means has yet been devised for the purpose, constitutional guaranties may be enforcible to some extent by other than the judicial authority. The Council of Censors in Pennsylvania and Vermont and the *Sénat Conservateur* of the French constitutions of 1799 and 1852 proved ineffective, but the Councils of Revision in New York (1777-1821) and Illinois (1818-1848) proved of some effect in enforcing constitutional limitations.

The so-called right of revolution or abstract right to disobey the law cannot be called safeguards of an important character, but it is of importance to bear in mind that safeguards of property or individual right need not necessarily depend upon the distinction between constitution and statute, and need still less to depend upon a judicial enforcement of such a distinction. Nor need such a safeguard have a legal basis in order to be effective. The safe-

guards referred to above as political (*i. e.* not judicially enforcible) fall really into three classes, (a) the purely political, (b) those having a legal basis, and (c) those having a constitutional basis; and for some countries to-day the purely political safeguards are the most effective.

It may be well to discuss briefly the political safeguards in Great Britain. This subject has been vigorously agitated during the past few years in England in connection with the passage of the Parliament Act of 1911. Before 1911 the House of Lords possessed the power to force a popular election upon any important measure (not financial) as to which the popular will had not been expressed in a general election, and it actually exercised this power as against measures proposed by the Liberals, the party most apt perhaps to bring forward legislation of a radical character. The supporters of the House of Lords did not claim and had not for a long period claimed power to defeat legislation which had been approved by the people, but they did claim power "to reject any bill of first rate importance which the House [of Lords] reasonably and *bona fide* believed to be opposed to the permanent will of the country."[3] The function of the House of Lords, so conceived, was that of forcing an appeal to the people, and advocates of the House of Lords pointed with assurance to the fact that the Lords' rejection of Irish Home Rule in 1893 was decisively supported in the general election of 1895; this case, in the language of Professor Dicey, "means that at a great crisis in the fortunes of England, the hereditary House of Lords represented, whilst the elected House of Commons misrepresented, the will of the people."

Under the Parliament Act of 1911, the control of the Lords over money bills is specifically denied, and as to other bills the Lords' opposition may be overcome if a bill is passed by the Commons in three successive sessions provided "two years have elapsed between the date of the second reading in the first of those sessions of the bill in the House of Commons and the date on which it passes the House of Commons in the third of those sessions." The Lords thus have a suspensive veto for two years. The Commons are now elected for five years, and are not apt to be dissolved before the expiration of that period, and although elected upon one issue may, during the first three years, bring forward important measures not made an issue in the general election, and push these measures through before the next general election. It is this

[3]Dicey, Rights of Citizenship, 85.

situation which causes Mr. McKechnie and Mr. Dicey to say that England is subject to the uncontrolled dominance of a popular chamber and that constitutional safeguards in England have been destroyed. The Conservatives urge the organization of a strong upper house with greater power as a remedy for this situation, and also the referendum. The preamble to the Parliament Act of 1911 promises to "substitute for the House of Lords as it at present exists a second chamber constituted on a popular instead of hereditary basis," but this promise is not likely to be carried out by a Liberal government. A more powerful second chamber, representing property or aristocratic interests, which could delay or defeat the measures of the Commons, would be a more effective safeguard than the present House of Lords, although such a house if organized would in the end have to give way before a definite expression of popular will represented by the election of a majority to the House of Commons. It is true that no machinery exists in England since 1911 by which in each case a popular judgment may be insisted upon before the enactment of an important measure. It is for this reason that the referendum is urged—the plan of submitting to the people the specific question, divorced from the complicating issues that present themselves in a general election. A greater popular participation is thus regarded as an additional safeguard and would actually be so.

As a matter of fact, the House of Lords as a conservative influence is perhaps not so powerless since 1911 as many English authors would, in their political arguments, have us believe.[4] The Lords may delay a measure for two years, and if the measure is presented within the last two years of the terms of members of the House of Commons, the Lords may prevent its passage until after the next general election. Within the first three years of their term, however, the Commons are legally limited only by the provision for a two-year delay, and during this period the English government approaches that of a single chambered body with legally unlimited powers. Yet, politically, the influence of the House of Lords is apt still to remain somewhat large.[5]

The most important safeguards in England to-day are the purely political as opposed to the legal. In the first place, no House of Commons, even though legally unlimited during its first

[4]See Lowell, Government of England (New Edition) Vol. 1, 433-436.

[5]See remarks in Sidney Low's Governance of England (New Edition, 1914) xiv.

three years of service, is likely to pass measures which it thinks will meet with the distinct disapproval of the people at the next general election. The general election each five years serves as a general referendum and will keep a popular chamber from getting very far beyond what the people will approve, although of course there is no sufficient check upon specific measures; this safeguard is weakened though not destroyed by the more effective party discipline of the present day and the tendency toward coalition ministries, in which each group will insist upon the passage of its measure in return for its support.

Mr. Sidney Low, in dealing with this question, has said recently: "But under a single-chamber system, it may be said, the check which an upper house exercises upon the abuse of its position by a cabinet would cease to operate. It does not operate very effectively at present and it is likely to grow weaker. The real restraint upon the majority in the Commons is the existence of the Opposition in the House and the Constituencies, and the knowledge that the sovereign electorate can and will call the alternative government into office if it is dissatisfied with the conduct of the group it has placed in power. The abolition of the second chamber is not likely to be seriously contemplated. But if it were accomplished it would be a far less revolutionary change in the substance, if not the form, of our system than is commonly supposed." Mr. Low does, however, favor the referendum as a means of expressing the popular will, when ministers are unwilling to submit to a general election. This is perhaps to say that the present organization in England is not sufficiently democratic, and should have imposed upon it the check of more democracy.

Most effective, however, is the safeguard resulting from the fact that while the electorate is democratic, the actual conduct of government is in the hands of the upper classes. So true is this that a brilliant little book in 1911 charged that the whole party system in England is a pious fraud maintained by secret alliance among political leaders (aristocratic and plutocratic) for the purpose of deceiving the people, and governing in their own interests. A quotation will make this view clear: "We have to-day to deal not with a divided but with a united plutocracy, a homogeneous mass of the rich, commercial and territorial, into whose hands practically all power, political as well as economic has now passed. . . . It [power] has passed to a political committee

for which no official name exists (for it works in secret), but which may be roughly called 'The Front Benches'. This committee is not elected by vote, or by acclamation, or even by general consent. Its members do not owe their position either to the will of the House or the will of the people. It is selected —mainly from among the rich politicians and their dependents —by a process of sheer and unchecked co-optation. It forms, in reality a single body, and acts, when its interests or its powers are at stake, as one man. No difference of economic interest or of political principle any longer exists among its members to form the basis of a rational line of party division. Nevertheless, the party division continues. The governing group is divided arbitrarily into two teams, each of which is, by mutual understanding, entitled to its turn of office and emolument. And a number of unreal issues, defined neither by the people nor by the Parliament, but by the politicians themselves, are raised from time to time in order to give a semblance of reality to their empty competition. That is the Party System as it exists to-day, and by it the House of Commons has been rendered null, and the people impotent and without a voice."[6] This was published at a time when England was echoing with the cry that all political and constitutional safeguards were being destroyed. The view expressed above has some apparent basis. Let us turn to less exaggerated statements.

Writing in 1904 Mr. Sidney Low said that the English workingman has remained "generally faithful to the tradition, which has prevailed through all English history, that the conduct of public affairs should be largely entrusted to those who enjoy the advantages of birth, breeding, and affluence."[7] More recently President Lowell has said: "The fact is that the upper classes in England rule to-day, not by means of political privileges which they retain, but by the sufferance of the great mass of the people, and as trustees for its benefit. Their leadership is highly popular with the masses, but it depends upon keeping the respect of the nation by a generally unstained reputation for probity of character; for if that reputation were seriously impaired the ruling class would soon be swept from power. . . . Moreover, most of the men who play the leading parts in the game of politics, as trustees for the people under the public eye, have fought together

[6]Belloc & Chesterton, The Party System (1911) 29, 33-34.

[7]Low, Governance of England (New Edition, 1914) 174, 176, 190.

in the sports of schools and colleges, and are constantly meeting in the society of London. This in itself tends to make them play the game fairly, and observe the conventional rules of honor of the day."[8] Mr. Low, writing again in 1913, says that the democratic element in Parliament has increased, but feels that conditions have not altered to a great degree. He says: "A parliament in King George V's reign includes a larger body of persons of moderate means, persons who have had to earn their livings by their own exertions, than any parliament in the reign of Queen Victoria. But the socio-political class, and the descendants of the 'governing families' are still well represented, and if the aristocratic element is declining the plutocratic is growing stronger."

It may properly be said that in England to-day there are no purely legal safeguards upon government, but there is the important safeguard of a purely political character, in that the government is operated by an upper class group, while controlled by a democratic electorate. The non-judicially enforcible safeguards in England are certainly less than those in this country and it is worth noting that the United States has been referred to in much of the British discussion as *par excellence* the country of constitutional safeguards, and this without reference to the additional fact that in this country there are judicially enforcible guaranties of individual rights. It is an interesting fact that in the British discussion of safeguards in the United States primary attention has been paid to checks and balances in governmental organization, and little to the judicial power to enforce constitutional guaranties.

Before taking up the subject of judicially enforcible guaranties, emphasis should be placed upon the fact that judicially enforcible guaranties, in all countries where they are found, exist in connection with and in addition to guaranties or safeguards which are political or not judicially enforcible. As has already been suggested the system of judicial guaranties in the United States supplements an elaborate body of political safeguards as well. If an issue is raised as to types of guaranties under present conditions, the question would largely be one as to mere political guaranties on one side, as opposed to political plus judicial guaranties on the other.

[8]Lowell, Government of England (New Edition) Vol. 2, 508.

2. Judicial Guaranties.

The doctrine that courts shall enforce constitutional limitations against the legislature has now a wider acceptance than is generally appreciated. In Australia, Argentina, Greece, Norway, and Roumania, the courts enforce constitutional limitations in much the same manner as they do in the United States, although cases arise much less frequently than they do with us. In Switzerland the federal court enforces against cantonal legislation the guaranties in both cantonal and federal constitutions. For Canada a judicial control exists in order to keep the provincial and dominion legislatures within the limits of the British North America Act.[9] The constitutions of Portugal, Nicaragua, Honduras, Cuba, Haiti, and Venezuela expressly grant to the courts power to disregard laws conflicting with the constitutions, and in several other Latin-American constitutions there are provisions which imply a similar power. Too much reliance, however, must not be placed upon the declarations in some of these constitutions. In Haiti, where power is conferred upon the courts in most positive terms, it has never been exercised and its existence as a reality is denied by a recent author.[10] To complete the list, it may be added that in Liberia the courts exercise such a power,[11] and that a judicial power over legislation was asserted in the Transvaal in 1896.[12]

The question of judicial control over legislation has been discussed in a number of the European countries, more especially in Belgium, Germany, and France; and French jurists, while denying the present existence of such a power in France, are overwhelmingly in favor of the adoption of the principle of judicial control.[13] In fact one of the ablest of French jurists has recently

[9]In a number of federal governments (Brazil, Mexico, Switzerland, Germany) there exists impliedly or expressly a judicial power to disregard state laws which conflict with the federal constitution or laws, but this may be regarded more appropriately as a control of superior over inferior legislation, rather than a true judicial control over legislation. Canada belongs to this class also, and in part Australia and the United States.

[10]Joseph Justin, *De L'Organization Judiciaire en Haiti* (Havre, 1910) 115-120.

[11]1 Liberia Supreme Court Reports, 243.

[12]Brown *v.* Leyds, 4 Kotze's Reports, High Court South African Republic, 17. Cape Law Journal, Vol. 14, pp. 71, 94, 109. J. W. Gordon in 14 Law Quarterly Rev. 343.

[13]Duguit, *Transformations du Droit Public* (1913) 91-103. See also Larnaude, *Bulletin de la Société de Législation Comparée,* Vol. 31 (1901-2) 175-229, 240-257.

argued that a judicial power to declare laws invalid exists as a matter of course, in the absence of express constitutional declaration to the contrary.[14]

But the issue under discussion in this paper is not the broad one of judicial power to declare laws unconstitutional, but the narrower one as to the use of such a power to enforce constitutional guaranties of individual rights and of property. A judicial power over legislation is of no great value for the purposes here under discussion unless linked with (1) guaranties of individual rights, and (2) a system which makes constitutional change relatively more difficult than the process of ordinary legislation. Canada and Australia have no broad constitutional guaranties. In Norway, Greece, and Roumania the cases in which constitutional guaranties have been judicially enforced against legislative action, though important, appear to be relatively few. A somewhat similar statement may be made with respect to Argentina. In Switzerland the judicial enforcement, against cantonal legislation, of constitutional guaranties in both cantonal and federal constitutions, is an active and effective force. The United States, however, and primarily the state courts in the United States, present the longest experience with a judicial enforcement of constitutional guaranties, and the judicial safeguard can be most satisfactorily discussed upon the basis of experience in this country. For this reason decisions from other countries will be cited in this paper only so far as they illustrate problems which have also presented themselves in the United States.

In the application of judicial power over legislation, constitutional limitations may be said to fall into three classes:

(1) Constitutional provisions which prescribe a clear and definite rule, capable of application by a court without any great discretion as to the interpretation or extent of the limitation. Few limitations fall within this class, and these relate largely to the form of legislative action or to specific prohibitions upon certain kinds of legislation. Such for example are constitutional requirements that a bill shall be read three times in each house[15] and that the readings shall be entered upon the journals. Yet some formal requirements are sufficiently indefinite to leave a large discretion in the court. Such a provision, for example, is that of

[14]Gaston Jèze, *Revue du Droit Public et de la Science Politique*, Vol. 29 (1912) 138.

[15]The requirement of three readings has become a mere empty form.

Illinois, which requires that no law shall be revived or amended by reference to its title only, but the law revived or the section amended shall be inserted at length in the new act.[16] Types of prohibitions upon specific kinds of legislation are those prohibiting special laws granting divorces, changing the law of descent, and remitting fines, etc.

(2) Limitations not so definite, but which yet provide something of a legal rule to guide the court. In this class come the provision in the constitution of the United States that no State shall pass any law impairing the obligation of contracts, and the provisions in state and federal constitutions that accused persons shall be entitled to trial by jury. Here terms are used which have a fairly definite meaning in a legal system, and the court in applying the limitations is guided by language which states a legal principle.

(3) Within the third class fall constitutional limitations of an indefinite character as that "no person shall be deprived of life, liberty, or property without due process of law," or that "no person shall be denied the equal protection of the laws," or that "private property is inviolate."

Constitutional guaranties of personal or property rights fall within the second or third classes, and there is no tendency to establish definite standards under such limitations. In fact there has been some tendency by judicial action to transfer provisions from the second to the third class. A prohibition of cruel and unusual punishments was once supposed to forbid punishments cruel in form, but has to a large extent been transferred by the courts into a prohibition of punishments which in the opinion of the court are disproportionate to the offense. The "due process of law" clause is the most striking illustration of this development. Once this limitation merely required procedure which would safeguard individual rights. Now it requires in addition legislation which in substance is such as the courts consider not unreasonable. The interests seeking protection naturally desire that protecting clauses be interpreted as broadly as possible, and in the long run they succeed in having their way.

But when decisions are based upon broad constitutional guaranties, interpreted as "due process of law" is now interpreted

[16]Ernst Freund, Supplemental Acts—A Chapter in Constitutional Construction, 8 Illinois Law Rev. 507.

by the courts, no definable legal principle is laid down for judicial guidance. Since 1886 the Supreme Court of Illinois has in a number of important cases declared laws unconstitutional as depriving of "due process of law" as to the substance of rights affected, yet the court has not sought to define "due process of law", and a standard of classification which it has accepted in one case it has rejected in another. Although the court has rejected a great number of statutes on the ground that they deprive of due process of law, it has not determined upon any standard to which it will adhere. With no rules for its guidance, the decision of the court in each particular case becomes the determination of a question of fact, and affords little if anything of a generalized legal principle. The Supreme Court of Illinois has so far been consistent neither with itself nor with any logical view in matters of classification under the "due process" clause. It has, as yet, afforded no guidance upon which the general assembly of Illinois may rely; no degree of care upon the part of the general assembly, even when accompanied by a knowledge of all the previous decisions of the court, is sufficient to determine in advance whether legislative action will be upheld or annulled when it comes before the court. A similar situation exists in practically every other State, and legislation upheld by one state court or the Supreme Court of the United States is in other States held unconstitutional as a deprivation of due process of law.[17] A similar indefiniteness appears in Switzerland in the enforcement against cantonal legislation of a guaranty that private property shall be inviolate.[18]

Professor Raymond Saleilles, in advocating the establishment

[17]No attention is here paid to the further complication in the United States which arises from the fact that both state and national constitutions have "due process" of law clauses, upon both of which a state court's decision is final, if it declares a state law unconstitutional. This situation leads to great difficulty, but the difficulty is not inherent in a system of judicial enforcement of constitutional guaranties. It should be suggested, however, that the action of the United States Supreme Court has caused little difficulty as compared with that of state courts.

This article was written before the enactment by Congress of Public Act 224 (approved Dec. 23, 1914) which permits the Supreme Court of the United States by certiorari to review state decisions holding state statutes invalid as violating the federal Constitution.

[18]*Entscheidungen des Schweizerischen Bundesgerichts,* Vol. 31 (1905) Part I, p. 645; Vol. 23 (1897) Part II, p. 1001; Vol. 37 (1911) Part I, p. 503. For similar development in Norway, see Morgenstierne, *Staatsrecht des Koenigreichs Norwegen,* 115-116. Excess condemnation, prevented in the United States and Argentina under the doctrine of "public purpose", is prevented in Switzerland on the ground that it violates the inviolability of property. *Entscheidungen* etc., Vol. 31 (1905) Part I, p. 645. See also *Fallos de la Suprema Corte* (Argentina) Vol. 33, (1888) p. 162.

of judicial control over legislation in France, said in 1902: "I have not lost all hope of having the objection of unconstitutionality apply in matters of individual right; but on the one condition that it be restricted to rights which may be not only affirmed in the constitution, but strictly defined in their existence, in their juridical contour, and in the conditions of their application."[19] Can such rights be strictly defined and made judicially enforcible? The protection of fundamental rights can hardly be reduced to a definite rule. When such a principle becomes capable of definite judicial or legal formulation it ceases to perform its intended purpose, for its purpose is to mark the line between private right and public interest, and this line is a constantly shifting one. Mr. Justice Holmes recently remarked that: "With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides."[20] But while the lines are being pricked out the pattern is changing. A rule once definitely formulated would in all likelihood be so broad as to require removal because unduly restrictive of legislative power or so narrow as to be innocuous. The judicial enforcement of constitutional guaranties almost necessarily implies broad undefined and undefinable limitations enforcible by the courts in the cases where they think proper, without the development of definite juridical standards. Such has been the experience of the past and is likely to be that of the future. The point of view of the courts in applying such guaranties changes, and has changed materially in this country within the past ten years, yet the guaranties themselves remain as indefinite as ever.

The problem of judicially enforcible constitutional guaranties is therefore a problem of judicial discretion in the interpretation of indefinite constitutional limitations. An effective theoretical argument can readily be made for judicial enforcement of constitutional limitations, for in modern governments the legislature is the body which acts positively in the development of new policies and is therefore most apt to transgress constitutional limitations, whereas the courts act negatively and do not ordinarily develop new policies.[21] Yet in enforcing broad limita-

[19] *Bulletin de la Société de Législation Comparée,* Vol. 31 (1901-2) 240-246.

[20] Noble State Bank *v.* Haskell (1911) 219 U. S. 104.

[21] It may be well to suggest that in Germany the movement for judicial control over legislation has largely related to the formal requisites of enactment, and was originally intended to protect the legislature by limiting the power of the monarch to promulgate as law measures which had not been approved by the legislative bodies.

tions according to their own discretion courts are positively determining policy, just so far as they succeed in preserving existing conditions and in checking new legislation. The policy is no less determined because it is determined by action which limits, rather than by action which constructs.

Judicial enforcement of broad constitutional guaranties must be tested, and must justify itself, as must every other political institution, not on theoretical grounds but by its actual results. And in an effort so to test it we should, so far as possible remove from our minds predispositions in favor of the system because it is one to which we have been accustomed. No one can satisfactorily discuss the value of an institution if he regards it as sacred. We must remember that most of our accepted judicial arguments and political theories have been developed to support already existing political institutions. Lest we give too much weight to such arguments and such theories, it should be borne in mind that, had the institutions been different, equally as satisfactory arguments and theories would have developed to support the different institutions.

In discussing the value of judicial enforcement of constitutional guaranties it should also be borne in mind that the courts of the United States in passing upon the validity of statutes have substantially discarded the doctrine,—laid down in earlier cases, and still repeated,—that the power to declare an act unconstitutional is a solemn and extraordinary function to be exercised (1) only in case of clear necessity, (2) as an incident to a *bona fide* controversy between parties, and (3) only in case the conflict between the statute and the constitution is clear beyond a reasonable doubt. The statement that the conflict must be clear beyond a reasonable doubt becomes meaningless when the constitutional provision applied does not itself state a defined principle, but is to be interpreted according to the discretion and opinion of the judge. In most important cases involving the constitutionality of statutes to-day the rights of the parties are incidental, and the important issue is the trial of the statute itself. A function cannot remain a solemn and extraordinary one when it is being performed every day. In the State of Illinois alone, seven hundred and eighty-nine cases since 1870 have involved constitutional questions, and one hundred and fifteen of these cases involved the "due process of law" clause; statutes were declared unconstitutional in two hundred and fifty-seven cases.

Assuming the situation to be what it is in the United States, let us discuss briefly some of the actual aspects of judicial enforcement of broad constitutional guaranties in this country. It has already been suggested that the courts have not developed and are not likely to develop, any definite legal standards to be applied in the enforcement of broad constitutional guaranties. This means, of course, an uncertainty as to the precise amount of constitutional protection. It may be well to repeat that constitutional guaranties as applied operate primarily to protect property rights. So far as purely individual rights are concerned, constitutional guaranties have proven largely ineffective.[22] Cases under immigration and white slave statutes illustrate this point. The constitution of West Virginia is most elaborate in its subordination of the military to the civil authority. Yet recent experiences show that constitutional safeguards were ineffective to protect individuals against military power. During our Civil War constitutional guaranties fell into abeyance, and the only real limitation upon governmental authority was that imposed by the necessity of keeping the support of the people. This situation was not altered by the fact that the United States Supreme Court, after the war had ended, boldly declared that, "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with its shield of protection all classes of men, at all times and under all circumstances." It may be urged that these statements relate to strenuous times, and that constitutional safeguards must not be judged by such conditions. Yet rights need protection only at a time when there is danger of their violation, and a safeguard which fails at such a time is not of great practical value. Writers on American constitutional law have often made fun of guaranties in some European constitutions which are in terms subject to suspension upon extraordinary occasions. We adopt the same practice but seek to conceal it from ourselves. Turning to guaranties operative in peaceful times, it must be admitted that to a large extent jury trial has, through the action and approval of the courts themselves, been encroached upon as a means of proceeding, at least in the field of public morals. Broad guaranties such as those of "due

[22]Where the right is sufficiently well established in fact, it exists and is respected without much reference to constitutional limitations. Such, for example, is the right to religious liberty. Where the right is not sufficiently well established in fact, constitutional guaranties do not prove effective.

process of law" and "equal protection of the laws," intended in large part to protect individual right, have been turned primarily into instruments for the protection of property.

But to what extent has the judicial application of constitutional guaranties protected property rights? Under "due process of law" the protection has been haphazard and irregular. Take, for example, the rule evolved from the "due process" clause that taxation may only be employed for a public purpose. The doctrine of public purpose was developed in such a manner as to prevent substantially none of the abuses of loans of public credit. Interference with property rights has to some extent been prevented under the "due process" clause in such matters as railroad rate regulation, but in other fields of public regulation of property there has been no assurance of real protection.[23] The courts, even under the broadest of constitutional guaranties, cannot destroy all legislation which they regard as unwise. They are very apt to sustain much unwise and burdensome legislation, which should never have been enacted. So, for example, legislation requiring an additional man upon each train crew is apt to be sustained, irrespective of facts that may make the enactment highly unwise. And so far as fundamental property rights are concerned it is probably true that when the matter becomes a politically important problem, the courts will be prepared to uphold laws which bring about a redistribution of property through the regulation of succession. Property in America uses judicial guaranties so far as possible, and gets what protection it can through them but does not rely upon them primarily for its protection.

Judicial enforcement of broad constitutional guaranties must be judged not in detail but by its results as a whole and it is true that a large mass of undesirable legislation has been defeated. Yet the value of the system must be determined by weighing its advantages against its disadvantages, and a large mass of useful legislation has been retarded or defeated, while at the same time judicial control has been ineffective as a means of checking vicious and unwise legislation. Take decisions for any one year or for any one State through a series of years, place on one side legislation which you may regard as unwise, and on the other what remains; there is no assurance that most of your cases of uncon-

[23] See, for example, the special burdens imposed upon railroads by the series of cases of which the latest is Missouri Pacific Ry. *v.* Omaha (Nov. 30, 1914) 35 Sup. Ct. Rep. 82.

stitutionality will deal with the first class. Some unwise and some wise legislation will be blocked, but the balance will not clearly be against the unwise.

Moreover, the system of judicial enforcement tends to overemphasize the question of constitutionality as against questions of wisdom and expediency, and reduces materially the responsibility which should rest upon legislature and people for the justice of legislation. The existence of the judicially enforcible guaranty weakens other safeguards, which in many cases would afford greater protection than the judicial one.[24] In addition the legislature has no standard to which it may adhere with safety, and cannot outline a consistent policy of legislation because it must constantly experiment in order to discover what the courts will sustain.

Much has been said recently about the fact that in passing upon constitutionality on the basis of broad guaranties courts are acting in a political or policy determining capacity, and this point of view has been exaggerated in Mr. Brooks Adams' *Theory of Social Revolutions*. Opposition to judicial control over legislation has existed only when the courts have run counter to the sober sentiment of the community. Where the courts have sought to solve important political questions by judicial decision they have clearly failed. Where, in other matters, the judicial attitude has not accorded with the sentiment of the community, the view of the community rather than that of the courts has in the long run prevailed. Yet when the opposition has occurred, the courts have lost something of popular respect and have been drawn into the political arena.

3. *Comparison of political and judicial guaranties.*

The United States has a system of political plus judicial guaranties as contrasted with a system of political guaranties existing in most of the other important countries. To what extent may the relative values of the two systems be determined on the ground (1) of a protection of individual and property rights, and (2) of a freedom upon the part of the government to meet new conditions? No basis of comparison exists because the question is not one as to whether protection of property and individual rights is more adequate in, say Great Britain, France or Germany, than it is in the United States. The protection of property and indi-

[24]Upon this whole matter, see Thayer, John Marshall, 102-110.

vidual rights may be, and probably is, more adequate in these countries. The question is rather, would these rights have been as well protected in the United States, in the absence of judicial guaranties? And in answer to this one can only resort to conjecture.

In Great Britain and in the countries of western Europe property rights and class distinctions are based upon traditions which run back for centuries. In this country the existence of judicial guaranties has led to a greater sense of security upon the part of property, and judicial power has doubtless been of value in a community such as ours where there were no traditional safeguards of property.

To what extent has legislative discretion in meeting new conditions been more restricted under judicial than under political guaranties? In this respect it may be said that in the long run the results under the two systems are not materially dissimilar. As already suggested, the sober sentiment of the community finally prevails in this country where it comes into conflict with judicial decisions. To some extent desirable legislation may be retarded and for a time destroyed, as was in part true of truck legislation in the United States, and our legislatures may be prevented by judicial interference from outlining a consistent program of reform. The movement for social and industrial legislation in the United States began later than in Europe and because of our social conditions it has not progressed as far, yet in reading such works as those of Dicey and Duguit[25] one is impressed with the fact that the development in the United States, so far as it has gone, has not been very different from that in England and France.

Our courts have in many matters prevented a consistent legislative policy, and have interfered with particular types of legislation, so that in the United States we have at almost every stage in the development of new policy been subject to material retardation; yet, although retarded and to some extent defeated in detail, the general legislative policy has won acceptance. To what extent the retardation in itself has been desirable it would be hard to say, yet it must be admitted that any gain in this respect has been in large part offset by the loss to the courts themselves in public esteem and confidence. The final success of legislative

[25]Dicey, Law and Public Opinion in England during the Nineteenth century. Leon Duguit, *Transformations Générales du Droit Privé depuis le Code Napoléon* (1912).

policies which have met with judicial opposition has come (1) either because the courts themselves have departed from the views which they first expressed, or (2) because judicial opposition has been overcome by constitutional change.

A very great change has taken place in the attitude of state courts during the past ten years, and they are now upholding legislation which a few years ago they would probably have declared unconstitutional. Except for one or two rather unfortunate lapses, the Supreme Court of the United States has taken a liberal attitude toward legislation aimed to meet new social and industrial conditions. A statement of Mr. Justice Holmes sums up what is becoming the attitude of the courts: "It may be said in a general way that the police power extends to all the great public needs. . . . It may be put forth in aid of what has been sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."[26]

When the court misinterprets the community need in holding a statute unconstitutional, the effect of such a decision is apt in time to be overcome by the court itself, either by a gradual shifting of attitude or, less frequently, by an express reversal of decision. Courts in changing their attitude do not move in a straight line, and their later views may not be logically consistent with their earlier ones. But "the life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[27]

But the change of attitude upon the part of a court usually takes some time, and it is often necessary to overcome promptly the effect of a decision based upon broad constitutional guaranties. So it becomes necessary for the people by constitutional change to authorize the policy of which the court has disapproved. When the Colorado Supreme Court held the fixing of an eight hour day for mines and smelters invalid as a deprivation of due process of law, the state constitution was so changed as expressly to provide for such legislation. And when the Court of Appeals of New York declared a compulsory workmen's compensation law

[26]Noble State Bank *v.* Haskell (1911) 219 U. S. 104.

[27]Holmes, The Common Law, 1.

a deprivation of property without due process of law, a state constitutional amendment was adopted expressly authorizing such legislation. Even the cumbersome machinery for the amendment of the national Constitution was brought into operation to overcome a decision of the United States Supreme Court denying, partly in the interest of property, the power of the national government to levy an income tax.

Under a system of judicial guaranties the lines between public interest and private right are redefined in part through the changing interpretations of the courts themselves. In case the interpretation of the court conflicts with the sentiment of the community the issue comes into the political field and sometimes threatens the independence of the court itself. Yet the danger here may easily be over-emphasized, and is indeed not very great if the judges be intelligent. When the courts mistake the sober view of the community as to the public interest, their decisions may be overcome by constitutional amendments in which the community view expresses itself. The judicial limitation is, then, a limitation of democracy, not a limitation against democracy, if the machinery of constitutional change is workable without great difficulty.[28] With the great difficulty of amending the national Constitution an unwise national court has power to impose permanent and burdensome limitations upon both state and national action, through its interpretation of broad constitutional guaranties. A somewhat similar statement applies to Illinois, whose constitution is very difficult to amend. Under conditions such as these, judicial guaranties approach the position of permanent limitations against democratic government. Only the wisdom of the Supreme Court of the United States has prevented the guaranties in the national Constitution from serving this purpose.

If constitutions be easily amendable, the judicial enforcement of broad constitutional guaranties is not objectionable, and has some useful features. The system of judicial guaranties has in many cases worked badly, and it is hardly as important in the

[28] As a matter of fact, there is a tendency in many States to weaken the distinction between forms of constitutional and statutory enactments, and in six States constitutional amendments may be proposed and adopted through the initiative and referendum in precisely the same manner as statutes. Under such conditions the importance of a state constitutional guaranty is likely to diminish. In some of the Swiss cantons the methods of constitutional and statutory enactment are substantially the same, yet the federal court enforces the guaranties in the cantonal constitution against cantonal legislation. *Entscheidungen des Schweizerischen Bundesgerichts,* Vol. 37 (1911) Part I, pp. 518-519.

protection of individual and property rights as is ordinarily assumed. Yet all human institutions work to some extent badly, and the fact that one system works badly does not mean that another should be adopted, for transplanted institutions seldom work as well as native ones. The system of judicial guaranties has become so much a part of our governmental organization that its abolition might lead to unforeseen and undesired results. The case may be one in which we should continue as an existing institution a form of organization which, were we starting anew, we would not establish. For this reason we cannot completely agree with the view expressed by the leading authority upon the constitution of the Netherlands: "We would act wisely by simply putting this question: To which power (in the state) can the final decision in regard to the true meaning of the provisions of the constitution be best entrusted? The answer to this question, it seems to me, need not everywhere be the same, for the peculiar character of the legislative and judicial power in different countries may easily have great influence on the decision. So far as our own state is concerned, I readily admit that the decision is a matter of indifference to me, and I would view with equal unconcern the testing right entrusted to or withheld from the judge."[29]

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[29]Buys, De Grondwet, Art. 121, Clause 2.

PRIZE CASES IN THE ENGLISH COURTS ARISING OUT OF THE PRESENT WAR.[1]

Sixty years ago the British Prize Courts adjudicated cases growing out of the Crimean War. Since that time no British Court has sat as a Prize Court until the present war. During the same period, however, a considerable body of decisions have been made, in this country by the United States Courts in the Civil War and the Spanish-American War, and in Russia and Japan by their Prize Courts in the Russo-Japanese War.

In the United States, neither the Constitution nor the Judiciary Act of Sept. 24, 1789 contains an *explicit* grant of jurisdiction in matters of prize. The United States District Courts, however, as courts of admiralty, possess jurisdiction as courts of prize.[2] This jurisdiction is now statutory, being at present embodied in § 24 of the Federal Judicial Code, Act of March 3, 1911, by which the United States District Courts are given original jurisdiction "of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize." By § 238 of the same statute, the United States Supreme Court is given jurisdiction of appeals, taken direct to that Court, "from the final sentences and decrees in prize causes." In interpreting these same words in the Act of March 3, 1891, the Supreme Court held in *The Paquete Habana*[3] that this appellate jurisdiction is not dependent on the amount involved, nor on the granting of a certificate by the District Court as to the importance of the case. The

[1]It would be presumptuous to attempt to discuss the general subject of prize and contraband in view of the erudite and authoritative treatment of these two subjects in John Bassett Moore's International Law Digest (1906) chapters 24, 25 and 26. Since the publication of that work, however, the decisions of the Japanese and Russian Prize Courts in the Russo-Japanese War have become available in English, the Second Hague Conference has been held, and the Declaration of London has been adopted by the International Naval Conference at London, Feb. 26th, 1909. The purpose of this article is to discuss, with such notes as may seem necessary, the principles involved in decisions in prize cases in the English courts arising out of the present war.

For extended notes on the principles and practice in prize cases, see 1 Wheaton, Appendix, pp. 494-506, 2 Wheaton, Appendix, pp. 1-80, and Pratt's, Story, Notes on the Principles and Practice of Prize Courts. See also on prize practice, Benedict, Admiralty (4th ed.) c. 41.

[2]Glass *v.* The Sloop Betsey (1794) 3 Dall. 6, 16; The Amiable Nancy (1818) 3 Wheat. 546, 557, 558.

[3](1899) 175 U. S. 677.

Supreme Court does not possess original jurisdiction in matters of prize.[4]

In England, by § 4 of the Supreme Court of Judicature Act, 1891, the High Court of Justice was declared to be a Prize Court, having all the jurisdiction possessed by the former High Court of Admiralty when acting as a Prize Court,[5] and, subject to rules of court, all causes and matters within the jurisdiction of the High Court as a Prize Court are assigned to the Probate, Divorce and Admiralty Division of the Court. In addition to this statutory grant of prize jurisdiction, a Commission was issued by the Crown at the beginning of the present war to the High Court of Justice authorizing and requiring it "to take cognizance of and judicially to proceed upon all and all manner of captures, seizures, prizes and reprisals of all ships, vessels and goods that are or shall be taken, and to hear and determine the same; and according to the course of admiralty and the law of nations, and the statutes, rules and regulations for the time being in force in that behalf, to adjudge and condemn all such ships, vessels and goods as shall belong to the German Empire or the citizens or subjects thereof, or to any other persons inhabiting within any of the countries territories or dominions of the said German Empire, which shall be brought before you for trial and condemnation." A separate Commission was issued with reference to vessels and cargoes belonging to Austria-Hungary or the citizens, subjects or inhabitants thereof.[6]

By § 4 of the Supreme Court of Judicature Act, 1891, it is provided that any appeal from the High Court when acting as a Prize Court shall lie only to His Majesty in Council. In addition to the existing Vice-Admiralty Courts in the colonies, the King was, by Act of September 18, 1914, authorized to confer jurisdiction in matters of prize on the Supreme Court in Egypt, the Court in Zanzibar and the Supreme Court in Cyprus, co-extensive with the jurisdiction of Vice-Admiralty Prize Courts. Appeals from any Prize Court within His Majesty's Dominions are taken direct to His Majesty in Council.[7]

In the courts of both England and the United States, the procedure in prize cases is established by statutes and special rules. In England the law of procedure is found in The Naval

[4]The William Bagaley (1866) 5 Wall. 377, 412.

[5]§ 4, The Naval Prize Act, 1864.

[6]The Roumanian [1915] P. 26, 41, 42.

[7]§ 5, The Naval Prize Act, 1864.

Prize Act, 1864, as amended by The Prize Courts Act, 1894, and The Prize Courts (Procedure) Act, 1914, and supplemented by rules promulgated by Order in Council dated August 5, 1914, under the authority granted by § 3 of The Prize Courts Act, 1894. The United States statutes dealing with proceedings for condemnation of prize are contained in the Revised Statutes §§ 4613-4629, 4636-4652, and 1009. The prize rules of the United States District Court for the Southern District of New York appear in Benedict's Admiralty.[8]

Standing interrogatories to be addressed by a prize commissioner to masters, officers, and members of the crew of the captured vessel and to all who were on board at the time of capture, *in preparatorio,* appear in 2 Wheaton, appendix, 81. Preparatory interrogatories for the Southern District of New York are given in Benedict's Admiralty.[9] The standing interrogatories used in the English High Court of Admiralty at the close of the eighteenth century are given in 1 C. Robinson, 381.

The first prize case arising out of the present war, to be argued and decided in the English Courts, was that of *The Chile.*[10] The question involved was the right of one belligerent to seize the merchant vessels of an enemy, which were in the ports of the former on the outbreak of war. On August 4, 1914, the German barque *Chile,* of Bremen, arrived at Cardiff in ballast; at 11 P. M. on the same day war was declared between Great Britain and Germany; and on August 5 the barque was detained by the Collector of Customs at Cardiff. It was held that the barque was a merchant vessel belonging to Germany, an enemy country, and that by international law The Crown was entitled to seize the ship although she was in port before the commencement of hostilities. The claim and appearance of the owners of the barque was stricken out on the ground that the test affidavit presented by their agents did not disclose the name of the owners, and did not show any grounds entitling them as alien enemies to appear in a British Court.

In the absence of treaty provision or a proclamation by one belligerent granting days of grace for the departure from its ports of merchant vessels belonging to the enemy, the right of a belligerent to seize and condemn all merchant vessels of the enemy found

[8](4th ed.) 535.

[9](4th ed.) 641.

[10][1914] P. 212, in the Probate, Divorce & Admiralty Division of the High Court of Justice, Sept. 4, 1914.

within its ports at the outbreak of war is undoubted.[11] Prior to the declaration of war by Great Britain against the Batavian Republic in 1803, the former laid an embargo on all Dutch ships then in her ports and seized them.[12] A similar embargo was proclaimed and enforced by Great Britain against vessels of the United States in anticipation of the War of 1812.[13]

The exemption of all private property from capture at sea as well as on land, has been urged by the United States, but the principle has not received general recognition. Article XII of the treaty between the United States and Italy, February 26, 1871, however, contains the provision that in the event of war between these two countries, the private property of their respective citizens and subjects, with the exception of contraband of war, and vessels and cargoes attempting breach of blockage, shall be exempt from capture or seizure, on the high seas or *elsewhere.*

In the Crimean War, Great Britain, by Order in Council, published March 29, 1854, the date on which war was declared between Great Britain and Russia, allowed to all Russian merchant vessels, in any ports or places within Her Majesty's dominions, six weeks from that date for loading their cargoes and departing, and such vessels if met at sea were ordered to be permitted to continue their voyages, provided they did not have on board contraband, an officer in the military or naval service of the enemy or any despatch of or to the Russian Government.[14] France also allowed six weeks from the date of her proclamation, March 27, 1854, to Russian ships of commerce to leave the ports of France, and to Russian ships not actually in French ports, or which had left Russian ports previous to the declaration of war, to enter into French ports and remain there for the completion of their cargoes.[15] Russia allowed English and French vessels six weeks from April 25, 1854, to load their cargoes and depart from Russian ports in the Black Sea, the Sea of Azof, and the Baltic, and six weeks from the opening of navigation to depart from ports in the White Sea.[16]

[11]The Johanna Emilie (1854) Spinks, Prize Cases, 12, 14; The Lesnik (1904) Russian and Japanese Prize Cases, Vol. 2, p. 92; The Kotik (1904) *id.*, p. 103.

[12]The Vrow Sarah, 2 Eng. P. C. 185, note; The Planters' Wench (1803) 5 C. Rob. 22. See also the Order in Council of March 6, 1665 in 1 C. Rob. 230, note, and The Gertruyda (1799) 2 C. Rob. 211.

[13]The Belvidere (1813) 1 Dods. 353.

[14]See The Fenix (1854) Spinks, 1, and Appendix D.

[15]Moore, Int. Law Digest, § 1196.

[16]Moore, Int. Law Digest, § 1196.

In the Spanish-American War the United States allowed thirty days from the declaration of war to Spanish merchant vessels in any ports or places within the United States for loading their cargoes and departing, and such vessels were by proclamation of the President allowed to continue their voyages provided they did not have on board any officer in the military or naval service of the enemy, or any coal, except an amount necessary for the voyage, or any contraband or any despatch of or to the Spanish government.[17] Spain allowed five days from April 23, 1898, the date of her decree, for the departure of United States merchant ships from Spanish ports, but the decree did not prohibit the capture of such ships after departure. No captures were made, however, by Spanish vessels.[18]

In the Russo-Japanese War, Japan allowed seven days from the date of the ordinance, February 9, 1904, to Russian merchant ships then lying in Japanese ports, to discharge or load their cargoes and depart, and such ships were by the ordinance exempt from capture if they sailed direct to the nearest Russian port, or to their original destination, provided they did not have on board contraband or Russian despatches. Japanese merchant vessels in Russian ports on the declaration of war were allowed not exceeding forty-eight hours from the time of publication of the Russian declaration (dated February 14, 1904) by the local authorities.[19]

The Japanese Prize Court at Sasebo, and the Higher Prize Court on appeal, held that this period of grace was not extended beyond the seven days in the case of a Russian vessel undergoing hull repairs in a Japanese port and without a crew.[20] In like manner, where the declaration of blockade of Confederate ports, declared by President Lincoln April 27, 1861, gave fifteen days after establishment of the blockade for neutral vessels to depart, a British vessel departing after the time allowed was condemned, although her departure within the time allowed was prevented by her inability to get a tug to tow her down the James River from Richmond to sea.[21]

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[17]Moore, Int. Law Digest, § 1196. See The Buena Ventura (1899) 175 U. S. 384, and The Panama (1899) 176 U. S. 535.

[18]Moore, Int. Law Digest, § 1196.

[19]Takahashi, International Law Applied to the Russo-Japanese War, 64, 65; Moore, Int. Law Digest, § 1196; Russian and Japanese Prize Cases, Vol. 1, p. 347, and Vol. 2, p. 445.

[20]The Manchuria (1905) Takahashi, 596, 598, Russian and Japanese Prize Cases, Vol. 2, p. 100.

[21]Prize Cases (1862) 2 Black, 635, 675.

Articles 1 and 2 of the Hague Convention VI (1907), dealing with the status of enemy merchant ships at the outbreak of hostilities, are as follows:

"Art. 1. When a merchant ship belonging to one of the belligerent powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated to it.

"The same principle applies in the case of a ship which has left its last port of departure before the commencement of the war and has entered a port belonging to the enemy while still ignorant that hostilities have broken out.

"Art. 2. A merchant ship which, owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated in the preceding article, or which was not allowed to leave, may not be confiscated.

"The belligerent may merely detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of paying compensation."[22]

The United States delegates did not sign this convention, on the ground that it was an unsatisfactory compromise,[23] nor was it submitted to the Senate for ratification.[24]

In *The Chile* the Attorney General asked merely for an order of detention of the vessel, pending inquiries as to the reservations which the German government had made to the articles of the Hague Convention above quoted, and the decree was that the barque had been lawfully seized as good and lawful prize, and that she should be detained by the marshal until further order of the Court.

No agreement was subsequently reached between Great Britain and Germany as to days of grace applicable to vessels of one belligerent found in the ports of the other belligerent on the outbreak of the war, and all such vessels, therefore, presumably will be condemned.

The striking out of the claim and appearance of the owners of *The Chile* was in accord with the early authorities. It has been held that an enemy cannot appear as claimant in a prize proceeding unless it appears by his affidavit that he comes under a flag of truce, a cartel, a license, or some other act of public authority,

[22]The full texts of the Hague Conventions of 1899 and 1907 are given in Scott, The Hague Peace Conferences of 1899 and 1907, Vol. 2.

[23]Stockton, Outlines of International Law (1914) 343.

[24]Scott, The Hague Peace Conferences, Vol. 2, p. 421.

suspending his hostile character.[25] Thus if an enemy's ship is captured within the territorial waters of a neutral country, the claim must be made, not by the enemy owner, but by the neutral government.[26] The consul of such neutral government cannot make claim *virtute officii,* without special authorization, but it would be otherwise in case of claim by a diplomatic representative.[27] A capture made within neutral waters is valid as between belligerents.[28] On the return of peace the owner may appear as claimant in a pending cause.[29] But where an American vessel was condemned in 1809 by the Vice-Admiralty Court of Grenada and an appeal taken to the High Court of Admiralty, the owner's appeal was dismissed on the breaking out of the War of 1812.[29a]

Under ordinances granting days of grace, and by the provisions of The Hague Convention and the Declaration of London, exemptions, either total or partial, are provided. How is an enemy owner of a vessel, not having his hostile character suspended, to urge the applicability of an exemption in favor of his vessel, if he cannot appear in the prize proceedings? This question was discussed and settled in the subsequent case of *The Möwe.*[30] A merchant sailing vessel of Rhandermoor, Germany, owned by her master, a German, was captured on the morning of August 5, 1914, while proceeding up the Firth of Forth, and was brought into Leith. The master did not know of the outbreak of war when his vessel was captured. An appearance was entered by him as owner of the vessel. He claimed that under Articles 1 and 2 of The Hague Convention VI (1907)[31] his vessel should not be con-

[25]The Hoop (1799) 1 C. Rob. 196, 200, 201; The Panaja Drapaniotisa (1856) Spinks, 337. The usual form of claim and affidavit appears in a note to the report of the latter case in 2 Eng. Prize Cases, at p. 563.

[26]The Vrow Anna Catharina (1803) 5 C. Rob. 15; The Eliza Ann and others (1813) 1 Dods. 244; The Twee Gebroeders (1800) 3 C. Rob. 162; The Twee Gebroeders (1801) 3 C. Rob. 336; The Florida (1879) 101 U. S. 37, 42.

[27]The Anne (1818) 3 Wheat. 435.

[28]The Anne, *supra*; The Adela (1867) 6 Wall. 266; The Sir William Peel (1866) 5 Wall. 517, 535. The Ship Richmond (1815) 9 Cranch, 102, an American vessel seized in Spanish waters for breach of Non-intercourse Act. The De Fortuyn (1760) Burrell, 175, a Dutch (enemy) ship captured in a Spanish (neutral) port over the protest of the Spanish governor, held liable to confiscation, but under the circumstances her value was restored to the owner.

[29]The Anne, *supra.*

[29a]The Charlotte (1813) 1 Dods. 212.

[30][1915] P. 1, in the Probate, Divorce & Admiralty Division of the High Court of Justice, Nov. 9, 1914.

[31]*Supra,* p. 321.

demned, but merely detained during the war. After citing authorities holding that an enemy has no standing in court, the Court held that in all fairness an alien enemy owner should be allowed to urge such an exemption in favor of his vessel, and declared a new rule of practice, *viz.:* that whenever an alien enemy conceives that he is entitled to any protection, privilege, or relief under any of The Hague Conventions of 1907, he shall be entitled to appear as a claimant and to argue his claim before the court, provided that the grounds of his claim be stated in the affidavit accompanying his appearance.

This rule is in accordance with the practice of the United States Courts in cases which involved claims for immunity under the President's Proclamation of April 26, 1898, made by the owners of Spanish vessels captured in the Spanish-American War,[32] or claims for immunity under the principles of international law.[33] The same practice was followed in cases arising out of the Russo-Japanese War, in both Russian and Japanese Prize Courts, where claims were made for immunity under the ordinances allowing days of grace or under the principles of international law.[34] If claim is made on the ground that the owner is a neutral, restitution cannot later be claimed on the ground that the owner is an enemy within the exception of an ordinance allowing days of grace.[35]

The next reported decision is *The Marie Glaeser,*[36] involving claims of a mortgage and maritime liens against an enemy's vessel. On August 1, 1914, the German steamship *Marie Glaeser,* of Rostock, owned by a limited liability company of Rostock, left Bristol for Archangel in ballast. On August 4 she put into Barry for bunker coal, and left the same day at 1 P. M. On August 5 she was captured at sea, her master being then ignorant of the declaration of war, and was brought into Glasgow for condemnation. Appearances were entered on behalf of (1) the owner, (2) separate shareholders in the ship, (3) the mortgagee, a Dutch

[32]The Pedro (1899) 175 U. S. 354; The Guido (1899) 175 U. S. 382; The Buena Ventura (1899) 175 U. S. 384; The Panama (1900) 176 U. S. 535.

[33]The Paquete Habana and The Lola (1900) 175 U. S. 677.

[34]The Möwe was condemned on the ground that she had been captured not in a port, but at sea.

[35]The Johann Christoph (1854) Spinks, 60.

[36][1914] P. 218, in the Probate, Divorce & Admiralty Division of the High Court of Justice, Sept. 11 and 16, 1914.

Company, (4) an English firm claiming for disbursements, (5) an English firm claiming for brokerage and necessaries, and (6) an English firm claiming for necessaries.

The first question was as to the applicability of Article 3 of the Hague Convention VI (1907), which provides as follows:

"Enemy merchant ships which left their last port of departure before the commencement of the war, and are encountered on the high seas while still ignorant of the outbreak of hostilities may not be confiscated. They are merely liable to be detained on condition that they are restored after the war without payment of compensation; or to be requisitioned, or even destroyed, on payment of compensation, but in such case provision must be made for the safety of the persons on board as well as the preservation of the ship's papers.

"After touching at a port in their own country or at a neutral port, such ships are subject to the laws and customs of naval war."

As Germany had made a reservation with respect to the article above quoted, her subjects were held not to be entitled to any of its benefits. The decree, therefore, was that the vessel be condemned as lawful prize and sold. The same decision was reached, on the same ground, in *The Möwe*.[37]

A sale under a decree of condemnation in a prize court vests title absolutely in the purchaser, so that if the vessel subsequently comes into the ports of the country of her original owner, he cannot claim the vessel as his.[38] The taking of a prize to a neutral port, is not usual, but in such case, nevertheless, the prize court in the captor's country has jurisdiction to condemn or restore the vessel lying in the neutral port, provided the representative of the captor remains in possession of the captured vessel.[39]

Captures in war inure to the government of the captor, and can become private property only by its grant.[40] In England the proceeds of prize, after deduction of court costs and expenses, are distributed among officers and men of the capturing vessels as may be directed by Order in Council.[41] In the United States, all

[37][1915] P. 1.

[38]The Star (1818) 3 Wheat. 78; Williams *v.* Armroyd (1813) 7 Cranch, 423.

[39]Hudson *v.* Guestier (1808) 4 Cranch, 293; Williams *v.* Armroyd, *supra*; The Henrick and Maria (1799) 4 C. Rob. 43; The Comet (1804) 5 C. Rob. 285; The Polka (1854) Spinks, 57.

[40]The Manila Prize Cases (1902) 188 U. S. 254, 258; The Florida (1879) 101 U. S. 37, 42; The Siren (1871) 13 Wall. 389, 392; The Dos Hermanos (1825) 10 Wheat. 306; The Elsebe (1804) 5 C. Rob. 173, 181; The Maria Francoise (1806) 6 C. Rob. 282, 293.

[41]Stat. 27 & 28 Vict. (1864) c. XXIV, § 15.

provisions of law authorizing the distribution of the proceeds of prize among captors, or providing for the payment of bounty for the sinking or destruction of enemy vessels, have been repealed.[42]

The claim and appearance of the owner of *The Marie Glaeser* was stricken out on the authority of *The Chile*.[43] With respect to the shareholders,—whether enemy or British,—the Court held that their property must go with the capture of the enemy vessel,[44] and the same was held as to the British firms who had advanced money or supplied necessaries to the vessel. With respect to the claim of the Dutch mortgagee to be paid out of the proceeds of sale, the Court applied the principle that liens, even those claimed by a neutral, are lost by capture.

It is well settled that no liens on vessels or cargo, excepting only the lien for freight on enemy's goods seized on a neutral vessel, are recognized by a Prize Court. Liens are based on private contract, the captor has no access to the original agreement and no way of disproving a collusive lien, and in order that the right of capture may not become worthless, the capture acts on the property without regard to secret liens. Thus the following claims of lien have been denied: a mortgage held by the consul of a neutral sovereign, resident in the enemy's country;[45] a bottomry bond, held by a national of the captor and executed before the outbreak of war;[46] a lien claimed by a neutral for unpaid purchase money;[47] a mortgage held by a loyal citizen of the United States on a Confederate vessel;[48] a claim for repairs and supplies by loyal citizens;[49] money advanced by a neutral on enemy cargo;[50] a claim by a national of the captor for advances and factor's lien;[51] salvage claimed by a neutral;[52] a claim by a neutral for necessaries sup-

[42]Act of March 3, 1899, § 13.

[43]*Supra.*

[44]See The Vrow Elizabeth (1803) 5 C. Rob. 4; The Primus (1854) Spinks, 48; The Industrie (1854) Spinks, 54; The William Bagaley (1866) 5 Wall. 377.

[45]The Aina (1854) Spinks, 8.

[46]The Tobago (1804) 5 C. Rob. 218.

[47]The Marianna (1805) 6 C. Rob. 24.

[48]The Hampton (1866) 5 Wall. 372.

[49]The Battle (1867) 6 Wall. 498.

[50]The Carlos F. Roses (1899) 177 U. S. 655.

[51]The Frances (1814) 8 Cranch, 418.

[52]The Nigretia (1905) Takahashi, International Law Applied to the Russo-Japanese War, with the Decisions of the Japanese Prize Courts, pp. 551, 553, Russian and Japanese Prize Cases, Vol. 2, p. 208.

plied.[53] Even a seaman's lien for wages against an enemy vessel is not allowed.[54]

It is equally well settled that the lien for freight on enemy's goods seized on a neutral vessel is recognized by a Prize Court. In *The Ship Societe*[55] freight was allowed to the master of a Swedish ship on which British cargo had been seized by a United States vessel. In *The Antonia Johanna*[56] and *The Hazard*[57] freight was allowed to the master of a Russian ship on which British cargo had been seized by United States vessels. In *The Hoop*[58] freight was allowed to the master of a neutral vessel on cargo that was condemned for illegal trading with the enemy.[59] The charter-party rate of freight is not necessarily the rate enforced against the captor in such case, for the charter-party rate may be excessive on account of the hazardous nature of the voyage, due to the existence of war.[59a] The lien is not recognized, however, if the goods seized are contraband, or if the neutral vessel is carrying on the coasting trade of the enemy.[60] Where a neutral ship has been restored, and her master has been paid freight out of the proceeds of enemy's cargo, and the remnants of the proceeds are insufficient to satisfy the expenses of both master and captor, the captor is entitled to priority as to the remnants for his expenses.[61] The question of allowing freight on enemy goods seized on a neutral vessel is not likely to arise in the future in view of the practically universal adoption of the Declaration of Paris (1856) provision: "The neutral flag covers enemy's goods, with the exception of contraband of war."

In *The Marie Glaeser* the court pointed out that the Crown might, out of its bounty, deal favorably with the neutral and British claimants, if their claims were presented to the proper government officers, but the court rejected as matter of law all

[53]The Russia (1904) Takahashi, 557, Russian and Japanese Prize Cases, Vol. 2, p. 43.

[54]United States *v.* The Sally Magee (1866) 4 Int. Rev. Rec. 134, Fed. Cas. No. 16,216.

[55](1815) 9 Cranch, 209.

[56](1816) 1 Wheat. 159.

[57](1815) 9 Cranch, 205.

[58](1799) 1 C. Rob. 196, 219.

[59]See The Roumanian, *infra*, p. 333.

[59a]The Twilling Riget (1804) 5 C. Rob. 82.

[60]The Emanuel (1799) 1 C. Rob. 296.

[61]The Bremen Flugge (1801) 4 C. Rob. 90.

the claims to the proceeds of the vessel. A Prize Court must decide in accordance with the principles of prize law, and in a case involving hardship, any plea for leniency must be addressed, not to the court, but to the government of the captor.[62]

The next case, *The Tommi* and *The Rothersand*,[63] raised the question of the validity of a transfer of title to a belligerent merchant vessel to a neutral during a voyage. The German sailing vessel *Tommi,* of Hamburg, owned by a German company, left Dantzig in July, 1914, with a cargo consigned to an English company, and arrived at Gravesend August 5, the day after the declaration of war between Great Britain and Germany, where she was detained as prize. Similarly the German schooner *Rothersand,* owned by the same German company, was on August 5 detained as prize at Kirkcaldy, at which port she had arrived on August 3. On August 1, the day on which war was declared between Germany and Russia, both vessels were on the high seas. On that day the German company, the owner of the two vessels, cabled the claimant, an English Company, in which the German company held nine tenths of the stock, that the German company *sold* the two vessels to the English company, and asked for cabled acceptance. On the same day the English company cabled acceptance. War was declared between Great Britain and Germany at 11 P. M. August 4, 1914.

At the time of detention, the vessels had not been transferred to British registry. They were therefore at that time *entitled to fly* the German flag, and were not then entitled to fly the British flag. Their nationality was therefore German, and they were subject to seizure as lawful prize[64] by the rule of international law as understood prior to the Declaration of London. The nationality of a vessel is determined by the flag which she flies, regardless of the nationality of her owner.[65] This rule has been expressly incorporated in Article 57 of the Declaration of London as follows:

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[62]The Benito Estenger (1899) 176 U. S. 568, 575; The Hoop (1799) 1 C. Rob. 196; The Amado (1847) Newb. 400, 403, 404; The Rossia (1904) Russian and Japanese Prize Cases, Vol. 2, pp. 43, 45.

[63][1914] P. 251, in the Probate, Divorce & Admiralty Division of the High Court of Justice, Oct. 12 and 15, 1914.

[64]The decree was an order for detention, as in The Chile, *supra.*

[65]The Vrow Elizabeth (1803) 5 C. Rob. 4; The William Bagaley (1866) 5 Wall. 377, 410; The Hallie Jackson (1861) Blatchf. Prize Cases, 1, 42; The Amado (1847) Newb. 400, 404; The Telegrafo (1846) Newb. 383.

"Subject to the provisions respecting transfer to another flag, the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly."

The Court also gave its opinion, though it stated it was not necessary to the decision, that the transfers, made while the vessels were in transit, were not valid because not *bona fide,* being manifestly intended, as the evidence clearly showed, merely to defeat the right of capture by a belligerent or belligerents when war was either an actual fact or imminent.

The sale of an enemy ship of war, lying in a neutral port, to a neutral, is invalid.[66] This is true even though the ship of war has been dismantled and fitted up as a merchant vessel prior to the sale to the neutral, and although the sale is *bona fide.*[67] The sale of an enemy merchant vessel to a neutral, made in anticipation of war and to escape the risk of war, is valid, if *bona fide.* This is true if the vessel is sold in port. It is also true if the vessel is sold while on a voyage, provided the voyage is ended and she comes into the possession of the purchaser before capture. The sale of an enemy merchant vessel to a neutral, during war, *flagrante bello,* is also valid if *bona fide,* provided the vessel is not purchased in a blockaded port.

In *The Ariel,*[68] a Russian ship owned by the Netherlands Consul at Riga, and lying at Libau, was sold March 18, 1854, to a Danish subject, one third of the purchase price being paid at the time of sale, one third to be paid in six months, and one third in nine months. War was declared between Great Britain and Russia March 29, 1854. In holding the transfer of title absolute, and the sale valid, although in anticipation of war, The Right Hon. Sir John Patteson stated the law as follows:[69]

"Their Lordships are of opinion, that there is abundant proof that the sale was made *imminente bello,* and in contemplation of it. Still, if the sale was absolute and *bona fide,* there is no rule of international law, as laid down by the Courts of this country, which makes it illegal. Such a *bona fide* sale made even *flagrante bello* would be legal, much more *imminente bello.*"

In *The Baltica,*[70] a Russian vessel was sold to a Danish subject, the vendor's son, March 17, 1854, *while on a voyage* from Libau to

[66]The Minerva (1807) 6 C. Rob. 396.
[67]The Georgia (1868) 7 Wall. 32.
[68](1857) 11 Moore P. C. 119.
[69]At p. 129.
[70](1857) 11 Moore P. C. 141.

Copenhagen. Part of the purchase money was paid at the time of sale, and the remainder was to be paid out of the earnings of the vessel. On arrival at Copenhagen, the purchaser took her and registered her under the Danish flag. She was subsequently seized at Leith. In holding the transfer of title absolute and the sale valid, The Right Hon. T. Pemberton Leigh said:[71]

"The general rule is open to no doubt. A neutral while a war is imminent, or after it has commenced, is at liberty to purchase either goods or ships (not being ships of war) from either belligerent, and the purchase is valid, whether the subject of it be lying in a neutral port or in an enemy's port. During a time of peace, without prospect of war, any transfer which is sufficient to transfer the property between the vendor and the vendee, is good also against a Captor, if war afterwards unexpectedly break out. But, in case of war, either actual or imminent, this rule is subject to qualification, and it is settled that in such case a mere transfer by documents which would be sufficient to bind the parties, is not sufficient to change the property as against Captors, as long as the ship or goods remain *in transitu*."

In *The Johanna Emilie*,[72] a schooner owned by the Hanoverian Consul at Riga was transferred to a Hanoverian subject at Hanover on January 22, 1854, while lying at Newcastle. The evidence being unsatisfactory, the claimant was allowed to take further proofs. Dr. Lushington, however, said:[73]

"With regard to the legality of the sale, assuming it to be *bona fide*, it is not denied that it is competent to neutrals to purchase the property of enemies to another country, whether consisting of ships or anything else; they have a perfect right to do so, and no belligerent right can override it."

In *The Benito Estenger*,[74] a vessel owned by a Spanish subject, resident in Cuba, was transferred June 9, 1898 to a British subject, and was registered as a British vessel at Kingston, Jamaica. On June 27, 1898 she was captured at sea, flying the British flag, but with Spanish officers and crew, and her former owner on board as super-cargo. The court held on the evidence that the sale was not valid as not being absolute and not *bona fide*. Chief Justice Fuller stated the law as follows:[75]

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[71] At p. 145.

[72] (1854) Spinks, 12.

[73] At p. 16.

[74] (1900) 176 U. S. 568.

[75] At pp. 578, 579.

"Transfers of vessels *flagrante bello* were originally held invalid, but the rule has been modified, and is thus given by Mr. Hall, who, after stating that in France 'their sale is forbidden, and they are declared to be prize in all cases in which they have been transferred to neutrals after the buyers could have knowledge of the outbreak of the war;' says: 'In England and the United States, on the contrary, the right to purchase vessels is in principle admitted, they being in themselves legitimate objects of trade as fully as any other kind of merchandise, but the opportunities of fraud being great, the circumstances attending a sale are severely scrutinized, and the transfer is not held to be good if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or its profits, a control over it, a power of revocation, or a right to its restoration at the conclusion of the war.' International Law, (4th ed.) 525. And to the same effect is Mr. Justice Story in his Notes on the Principles and Practice of Prize Courts, (Pratt's ed.) 63; 2 Wheat. App. 30: 'In respect to the transfers of enemies' ships during the war, it is certain that purchases of them by neutrals are not, in general, illegal; but such purchases are liable to great suspicion; and if good proof be not given of their validity by a bill of sale and payment of a reasonable consideration, it will materially impair the validity of a neutral claim; . . . and if after such transfer the ship be employed habitually in the enemy's trade, or under the management of a hostile proprietor, the sale will be deemed merely colorable and collusive. . . . Anything tending to continue the interest of the enemy in the ship vitiates a contract of this description altogether.'"

The burden of showing clearly the *bona fides* of the sale is on the claimant.[76] There must also be clear proof of payment of the purchase price.[77] It is not necessary that the *entire* purchase price be paid on the sale.[78] A voluntary transfer of a vessel by a father, an enemy, to his son, a neutral, having been agreed on seven months before war, as an advance of a portion of the latter's inheritance, being *bona fide,* was held valid although consummated only eleven days before the declaration of war.[79] The transfer

[76]The Bernon (1798) 1 C. Rob. 102; a French vessel sold during war to a citizen of the United States, resident in France, the vessel continuing in the hands of the former owners, condemned. The Ernst Merck (1854) Spinks, 98; a Russian ship transferred to a subject of Mecklenberg, March 13, 1854, condemned. The Benito Estenger, *supra.*

[77]The Johann Christoph (1854) Spinks, 60; a Russian ship transferred to her Danish master, condemned. The Rapid (1854) Spinks, 80; a Russian ship transferred to her Danish master, condemned. The Christine (1854) Spinks, 82; a Russian ship transferred to her master, condemned. The Ernst Merck, *supra.* The Benito Estenger, *supra.*

[78]The Ariel, *supra*; The Baltica, *supra.*

[79]The Benedict (1855) Spinks, 314.

of title must be absolute.[80] Thus where the enemy vendor retained an interest in the vessel, with a right to repurchase after the war, the transfer was held invalid and the vessel condemned.[81] A transfer of a vessel from an enemy to a neutral for the purpose of having the vessel continue in her former trade will not be recognized as a valid transfer.[82] Nor is a transfer valid where the management of the ship is retained by the vendor.[83] A transfer of an enemy vessel to a neutral in a blockaded port is invalid.[84]

Such is the law of England and the United States,—though not of France or Russia, which do not recognize a transfer after the outbreak of war,—as to the validity of transfer of title to enemy vessels, except in so far as it may now be modified by The Declaration of London. The pertinent sections of that declaration are as follows:

"Art. 55. The transfer of an enemy vessel to a neutral flag, effected before the outbreak of hostilities, is valid, unless it is proved that such transfer was made in order to evade the consequences to which an enemy vessel, as such, is exposed. There is, however, a presumption, if the bill of sale is not on board a vessel which has lost her belligerent nationality less than sixty days before the outbreak of hostilities, that the transfer is void. This presumption may be rebutted.

"Where the transfer was effected more than thirty days before the outbreak of hostilities, there is an absolute presumption that it is valid if it is unconditional, complete, and in conformity with the laws of the countries concerned, and if its effect is such that neither the control of, nor the profits earned by, the vessel remain in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than sixty days before the outbreak of hostilities, and if the bill of sale is not on board, the capture of the vessel gives no right to damages.

"Art. 56. The transfer of an enemy vessel to a neutral flag effected after the outbreak of hostilities is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed.

"Provided that there is an absolute presumption that a transfer is void—

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[80]The Benito Estenger, *supra*.

[81]The Sechs Geschwestern (1801) 4 C. Rob. 100.

[82]The Vigilantia (1798) 1 C. Rob. 1; The Embden (1798) 1 C. Rob. 16; The Ernst Merck (1854) Spinks, 98; The Benito Estenger (1900) 176 U. S. 568.

[83]The Jemmy (1801) 4 C. Rob. 31; The Bernon (1798) 1 C. Rob. 102; The Andromeda (1864) 2 Wall. 481; The Island Belle (1864) 21 Leg. Int. 60, Fed. Cas. No. 7107.

[84]The General Hamilton (1805) 6 C. Rob. 61.

"(1) If the transfer has been made during a voyage or in a blockaded port.

"(2) If a right to repurchase or recover the vessel is reserved to the vendor.

"(3) If the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing have not been fulfilled."[85]

The United States Senate ratified the Declaration of London April 24, 1912. Great Britain has not ratified it. She has not followed its provisions as to absolute contraband, conditional contraband and goods not contraband. It is an open question whether Great Britain, not having ratified, will claim that the declaration is binding on the United States, and also whether the United States, having ratified, will claim that she is not bound by the declaration.

The position of the British Government, up to the present time, is this. It has recognized the transfer to a neutral flag of enemy ships belonging to companies which were incorporated in the enemy country, but all of whose shareholders are neutral; it has waived its objections to transfers from companies incorporated in the enemy country which were subsidiary to and owned by United States corporations, provided such vessels shall take no further part in trade with the enemy country.[86] It has objected in principle to the transfer of German ships, lying in United States ports, to citizens of the United States, but has indicated that it will waive its objections even to such transfers, provided such ships, when transferred, shall not be employed in German trade.

In *The Tommi,* the British company consisted of only five shareholders, namely, a German director in Germany, his wife, a German subject in England and his wife, and the German company itself. The Court stated, but did not decide, that even if the decree had been for the claimant on the first two points, it was not to be assumed that a Prize Court could not say that a British corporation consisting entirely of aliens could not own a British ship under the Merchant Shipping Act of 1894 and that under the circumstances these two vessels were German.

[85]The text of the Declaration of London, together with the general report thereon presented to the London Naval Conference on behalf of its drafting committee, appears in the Supplement to the American Journal of International Law for April, 1914, and in Stockton, Outlines of International Law, Appendix, IV. A general discussion of the provisions of the Declaration of London by James Brown Scott, appears in the American Journal of International Law, April and July, 1914.

[86]Note from Sir Edward Grey to Ambassador Page, Feb. 10, 1915.

It is not clear that a British corporation, consisting entirely of alien stockholders, may not own a British ship under § 1 of the Merchant Shipping Act of 1894. Supposing, however, that such a corporation could own and register a ship under British law, such ship would be a British ship. That the nationality of a corporation is that of the state under whose laws it is incorporated was held in *The Pedro* and *The Guido*,[87] in which cases vessels, owned by a corporation incorporated under the laws of Spain, were held to be Spanish vessels, although British subjects were the legal owners of some and the equitable owners of the rest of the stock of the corporation. In *The Manchuria*[87a] a vessel owned by a Russian corporation and flying the Russian flag was held to be a Russian (enemy) ship, although the majority of the shareholders were Danish (neutral) subjects. In *Nigel Gold Mining Co., Ltd.*, v. *Hoade*,[88] it was held that a company incorporated under the laws of the British Colony of Natal was an English corporation and therefore not an enemy, although its business was entirely within the South African Republic. In *Robinson Gold Mining Co.* v. *Alliance Insurance Co.*,[89] in the Commerce Court, it was held that a company formed of British capital, incorporated under the laws of the South African Republic, was a national of that state and therefore an enemy. In *Driefontein Consolidated Gold Mines, Ltd.*, v. *Janson*,[90] in the Court of Appeal, it was held by Vaughan Williams, L. J., and Romer, L. J., that a company incorporated under the laws of the South African Republic was an enemy, although none of the shareholders of the company were subjects of the Government of the Transvaal.[91]

This question arose again in the case of *The Roumanian*,[92] where a cargo of refined petroleum oil in bulk, owned by a Bremen company, incorporated under the laws of Germany, and shipped before the outbreak of the war at Port Arthur, Texas, on a British vessel bound for Hamburg, was seized in the harbor of Purfleet. Neutral bodies and subjects were shareholders in the company to a considerable extent. The Court held that the cargo was enemy

[87] (1899) 175 U. S. 354, and 382.

[87a] (1905) Russian and Japanese Prize Cases, Vol. 2, p. 52.

[88] [1901] 2 K. B. 849.

[89] [1901] 2 K. B. 919

[90] [1901] 2 K. B. 419.

[91] The opinion of A. L. Smith, M. R., was *contra* on this point.

[92] [1915] P. 26, in the Probate, Divorce & Admiralty Division of the High Court of Justice, Dec. 7, 1914.

property, and it was condemned as such. The vessel was owned by a British company and flew the British flag. The vast majority of the shares in the steamship company were owned by the German company which owned the cargo, but there were also English shareholders and English directors, and its business was carried on in England. The Crown, without admitting liability, consented to payment of freight *pro rata itineris* to the steamship company.

The neutral nationality of a vessel as determined by the flag which she flies is not lost by the fact that at the time of capture she is under time charter to an enemy citizen or subject.[93] Her neutral flag will not protect her from condemnation, however, if she is captured while under charter to the enemy government,[94] or is engaged in unneutral service.[95]

On this point the Declaration of London, under the heading of Unneutral Service, provides in Article 46 as follows:

"A neutral vessel is liable to condemnation and, in a general way, to the same treatment as would be applicable to her if she were an enemy merchant vessel—

"(1) If she takes a direct part in the hostilities.

"(2) If she is under the orders or control of an agent placed on board by the enemy government.

"(3) If she is in the exclusive employment of the enemy government.

"(4) If she is exclusively engaged at the time either in the transport of enemy troops or in the transmission of intelligence in the interest of the enemy.

"In the cases covered by the present article, goods belonging to the owner of the vessel are likewise liable to condemnation."

The question of the exemption of enemy's fishing vessels was the next to be decided, in *The Berlin*.[96] On August 5, 1914,

[93]The Thea (1904) Russian and Japanese Prize Cases, Vol. 1, pp. 96, 108, in the Russian Supreme Prize Court. A German vessel chartered to a Japanese steamship company, restored.

[94]The Quang-Nam (1906) Russian and Japanese Prize Cases, Vol. 2, p. 343, in the Japanese Higher Prize Court. A French vessel chartered to the Russian Government, condemned. The Australia (1906) Russian and Japanese Prize Cases, Vol. 2, p. 373, in the Japanese Higher Prize Court. A United States vessel, chartered to the Russian Government, condemned.

[95]The Nigretia (1905) Russian and Japanese Prize Cases, Vol. 2, p. 201, in the Japanese Higher Prize Court. A British vessel, chartered to a Russian subject, condemned on account of knowingly carrying contraband persons to an enemy port.

[96][1914] P. 265, in the Probate, Divorce & Admiralty Division of the High Court of Justice, Oct. 29, 1914.

The Berlin, a German drift fishing sailing cutter of 110 metric tons, of Emden, owned by the Emden Herring Fishing Company, was captured 100 miles from the English coast and 500 miles from her home port. She carried a crew of 15 men, together with fish, salt, nets and stores. It appeared from her log that she had been on a fishing voyage in the North Sea. No claim was made on behalf of the vessel. The question was whether the vessel was immune from capture as a coast fishing vessel. The Court held that *The Berlin* did not come within the exempted class, and condemned both vessel and cargo.

The United States Supreme Court in *The Paquete Habana and The Lola*[97] reviewed the history of this question at length, showing that by ancient usage among civilized nations, beginning at least as far back as 1403 in an order of Henry IV of England to his admirals, which gradually developed into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war. The Court pointed out, however, that the exemption does not apply to coast fishermen or their vessels, if employed for a warlike purpose or in giving aid or information to the enemy, nor when military or naval operations create a necessity to which all private interests must give way; nor does the exemption extend to ships employed on the high sea in catching whales, seals, cod or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce. The Court restored, with damages and costs, both fishing smacks, which operated from Havana under the Spanish flag and were owned by Spaniards, resident in Cuba, and were regularly engaged in fishing on the coast of Cuba, and which carried neither arms nor ammunition.

In *The Michael*[98] and *The Alexander,*[99] decisions of the Sasebo Prize Court affirmed by the Higher Prize Court, it was held, as in *The Berlin,* that vessels owned by an enemy corporation and engaged in deep-sea fishing, are not exempt from capture as prize under international law. In *The Lesnik,*[100] the Japanese Prize Court at Sasebo condemned a whaler, owned by a Russian subject.

In *The Manila Prize Cases*[101] the Supreme Court held that the

[97] (1900) 175 U. S. 677.
[98] (1904) Russian and Japanese Prize Cases, Vol. 2, p. 80.
[99] (1904) Russian and Japanese Prize Cases, Vol. 2, p. 86.
[100] (1904) Russian and Japanese Prize Cases, Vol. 2, p. 92.
[101] (1902) 188 U. S. 254, 278, 279.

principle of the decision in *The Paquete Habana* covers small native boats, *e. g.* barges and derricks, the property of private citizens, captured in their home ports. Article XXXV of the Japanese regulations governing captures at sea, issued to take effect March 15, 1904, specifically exempted vessels employed for coast fishery, vessels making voyages for scientific, philanthropic, or religious purposes, light-house vessels and tenders, and vessels employed for exchange of prisoners.[102]

The Hague Convention VI (1907), Article 3, dealing with the question of coast fishing vessels is as follows:

"Vessels employed exclusively in coast fisheries, or small boats employed in local trade, are exempt from capture, together with their appliances, rigging, and cargo. This exemption ceases as soon as they take any part whatever in hostilities. The contracting Powers bind themselves not to take advantage of the harmless character of the said vessels in order to use them for military purposes while preserving their peaceful appearance."

In *The Berlin,* the Court expressly refused to pronounce whether or not German subjects would, in the circumstances of the present war, have the right to claim the benefit of the Hague Conventions, but pointed out that, in any event, a belligerent might by naval order exclude *all* coastal fishing vessels from immunity if there was reason for believing that some of them were being used for aiding the enemy.

If, as is reported, British trawlers have been armed for offensive action against German submarines, and German trawlers have been used in transporting mines, both British and German trawlers as a class have lost the privilege of exemption from capture.

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[102]Takahashi, 783, Russian and Japanese Prize Cases, Vol. 2, p. 430.

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NOTES.

CRIMINAL CONSPIRACY TO VIOLATE THE MANN ACT.—The common law misdemeanor of conspiracy is defined as a confederation to effect an unlawful object by lawful means, or a lawful object by unlawful means.[1] The agreement is the gist of the offense, and it is unnecessary to show any acts done in pursuance thereof.[2] There is a substantial unanimity of opinion that an indictment will lie if the ultimate of-

[1] 2 Wharton, Criminal Law (11th ed.) § 1600.

[2] See People *v.* Mather (N. Y. 1830) 4 Wend. 229, 259; State *v.* Buchanan (Md. 1821) 5 Har. & J. 317, containing a valuable review of the earlier English decisions.

fense be criminally punishable, or if the means adopted be criminal, although the end contemplated is lawful. The courts have, however, gone further in an endeavor to protect the community from the potentiality for evil inherent in the concurrence of several minds for unlawful purposes, and it is generally said that an agreement to do a non-criminal act will be indictable if the end in view is of such a nature that combined numbers will have a necessarily greater power for harm.[3] This test is, however, from its very nature, vague in the extreme, and the existence of an indictable conspiracy to commit unlawful acts not included in the above-mentioned classes, comes down virtually to a question of the individual court's opinion upon the public policy of the issues involved. The distressing uncertainty resulting from this state of affairs, particularly in labor disputes,[4] is contrary to the whole basis of criminal jurisprudence, which requires that punishable offenses be reasonably definite in scope,[5] with the result that many States have enacted statutes limiting or defining the offense.[6] Some of these statutes require, in addition, the commission of some overt act for the completion of the crime.[7] This is true of the federal enactment against conspiracy, which reads as follows: "If two or more persons conspire either to commit an offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy all the parties to such conspiracy shall be liable to a penalty . . ."[8]

The provisions of the statute punish agreements to defraud the United States in any manner,[9] as well as where the object contemplated is criminally punishable. The necessity of the commission of some overt act has been interpreted as giving the accused no more than a *locus poenitentiae,* since the unlawful agreement is still, as at common law, the gist of the offense.[10] Hence, the indictment need allege no more than the commission of some overt act by any one of the defendants,[11] and it is not necessary to allege how the act will

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[3]See 2 Bishop, Criminal Law (8th ed.) § 180. Thus agreements to defraud, Regina *v.* Warburton (1870) L. R. 1 C. C. R. 274; State *v.* Buchanan, *supra,* or to obstruct justice, Regina *v.* Hamp (1852) 6 Cox C. C. 167; State *v.* DeWitt (S. C. 1834) 2 Hill Law 282, or to extort money, Rex *v.* Kinnersly (1719) 1 Strange 193, or to injure the reputation of another, Rex *v.* Armstrong (1677) 1 Ventris 304; Rex *v.* Kinnersley (1760) 1 Wm. Black. 294, or to commit an immoral act, Regina *v.* Howell (1864) 4 F. & F. 160; Smith *v.* People (1860) 25 Ill. 1, are held indictable, irrespective of whether the ultimate offenses are substantive crimes.

[4]Compare State *v.* Donaldson (1867) 32 N. J. L. 151, with Commonwealth *v.* Hunt (Mass. 1842) 4 Metc. 111. See State *v.* Dalton (1908) 134 Mo. App. 517.

[5]See 2 Wharton, Criminal Law, § 1601.

[6]See N. Y. Penal Law, § 580.

[7]See 2 Bishop, Criminal Law (8th ed.) § 192; N. Y. Penal Law, § 583, which requires an overt act, unless the agreement is to commit a felony upon the person of another, or to commit arson or burglary.

[8]35 U. S. Stat. at L. 1096.

[9]See Curley *v.* United States (C. C. A. 1904) 130 Fed. 1.

[10]See Williamson *v.* United States (1907) 207 U. S. 425; United States *v.* Donau (C. C. 1873) 11 Blatchf. 168; but see Hyde *v.* United States (1912) 225 U. S. 347.

[11]Bannon *v.* United States (1895) 156 U. S. 464.

effectuate the object of the conspiracy.[12] Any overt act is admissible in evidence of the crime, although it is not set out in detail in the indictment, as in the recent case of *Houston* v. *United States* (C. C. A. 1914) 217 Fed. 852.

An interesting question arises when some one of the alleged conspirators is not punishable for the completed offense. The rule is established that a party who is incapable of committing the intended crime because of sex, age, position, or for other reasons, may nevertheless be convicted as principal in the second degree,[13] or as accessory,[14] a doctrine which has been carried over by analogy to the offense of conspiracy.[15] Because of the very danger inherent in a confederation, however, there may be an unlawful conspiracy where the ultimate crime is impossible of accomplishment,[16] and the state of facts, therefore, precludes the existence of an accessory to that crime. So where one party is not technically an accomplice, as for example, the woman in abortion cases, she may nevertheless conspire with others to commit an abortion upon herself.[17] It may, therefore, be generally stated that the inability of a person to commit the ultimate offense, either as a matter of fact or for reasons of law, does not preclude such person from being a party to a criminal conspiracy to commit that offense. There are, however, certain logical exceptions to this rule. In the first place, when the completed offense necessarily involves an unlawful agreement between two or more persons, and that offense is consummated, such persons cannot be convicted of a conspiracy to commit the offense,[18] since this would amount to a double conviction on the identical state of facts, and the rule against double jeopardy would be violated. But where there are parties to such a confederation other than those who have by agreement committed the substantive offense, there is an additional feature which makes the confederation different

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[12]United States *v.* Benson (C. C. A. 1895) 70 Fed. 591.

[13]The Trial of Mervin Lord Audley (1631) 3 Howell's State Trials 401; United States *v.* Snyder (1882) 14 Fed. 554.

[14]State *v.* Sprague (1856) 4 R. I. 257.

[15]United States *v.* Stevens (D. C. 1890) 44 Fed. 132; United States *v.* Martin (C. C. 1870) 4 Cliff. 156; Cohen *v.* United States (C. C. A. 1907) 157 Fed. 651; Regina *v.* Mears (1851) 4 Cox C. C. 423.

[16]See Regina *v.* Whitchurch (1890) L. R. 24 Q. B. Div. 420. In this case, a woman was held guilty of conspiring with others to procure an abortion on herself. Her co-conspirators were guilty of a statutory felony; but she, herself, could not, alone, be guilty of the intended offense, not being with child at the time.

[17]See Solander *v.* People (1873) 2 Colo. 48; State *v.* Crofford (1907) 133 Iowa 478.

[18]United States *v.* Dietrich (C. C. 1904) 126 Fed. 664; United States *v.* New York Central etc. Ry. (C. C. 1906) 146 Fed. 298. These cases cannot be based upon the doctrine that the conspiracy, being a misdemeanor, is merged in the subsequent felony, since that somewhat metaphysical theory has been repudiated in most of the States, Wait *v.* Commonwealth (1902) 113 Ky. 821; Commonwealth *v.* Stuart (1911) 207 Mass. 563, overruling Commonwealth *v.* Kingsbury (1809) 5 Mass. 106, and seems to be no longer law in the federal courts. See United States *v.* Gardner (C. C. 1890) 42 Fed. 829. The law in New York appears uncertain. See People *v.* Rathbun (N. Y. 1904) 44 Misc. 88.

on the facts from the ultimate crime, and a conviction for conspiracy will be sustained.[19]

The second exception includes a limited class of cases in which the parties are incapable of committing a conspiracy as a matter of law. Thus, since two parties are essential to a conspiracy, a husband and wife cannot be convicted for that offense where the common law doctrine of domestic unity prevails.[20] If, however, there is a third party to the agreement between the spouses, all may be liable.[21]

The final exception to the general rule is where there is a disability in fact, as where the nature of the ultimate offense negatives the inference that one or more of the defendants could have the *mens rea* necessary to a conspiracy for the commission of such offense. Thus, a trustee in bankruptcy cannot conspire with others to dispose of the bankrupt's property for the purpose of defrauding the trustee;[22] nor, it is submitted, can the injured woman be held for a conspiracy for her own seduction. This theory was recently urged in *Holte* v. *United States* (U. S. Sup. Ct. 1915) 35 Sup. Ct. Rep. 271, in which the female defendant, and a man, were indicted for conspiring that he should transport her in interstate commerce for immoral purposes, contrary to the penal provision of the federal statute known as the Mann White Slave Act.[23] Both defendants were nevertheless convicted, since the Mann Act distinctly provides that criminal liability shall attach whether the person transported goes willingly or unwillingly.[24] The court clearly held correctly, since the words "with her consent" permit the presence of a *mens rea* in the woman necessary to the existence of the conspiracy, and, as we have pointed out, it is immaterial whether or not she could have been held as a technical accomplice. The decision should have the necessary effect of doing away with the not infrequent attempts at blackmail which have resulted from the passage of the Act, and the supposed immunity afforded thereunder to the "victim", and the case is, therefore, in consonance with sound public policy as well as a logical application of existing law.

Waiver of Privilege Against Self-Crimination.—The privilege of a witness against self-crimination, being personal, cannot be asserted for him or taken advantage of by a third party,[1] and may be freely waived. Since an ordinary witness can be compelled to testify, he never waives his privilege by simply taking the stand,[2] but does so by answering the criminating question.[3] When the accused, on the

[19]Thomas *v.* United States (C. C. A. 1907) 156 Fed. 897; see Chadwick *v.* United States (C. C. A. 1905) 141 Fed. 225; United States *v.* Shevlin (D. C. 1913) 212 Fed. 343.

[20]People *v.* Miller (1889) 82 Cal. 107.

[21]See Kirtley *v.* Deck (Va. 1811) 2 Munf. 10.

[22]Johnson *v.* United States (C. C. A. 1907) 158 Fed. 69.

[23]36 U. S. Stat. at L. 825, c. 395. The act has been held constitutional, as a valid exercise of the federal police power. Hoke *v.* United States (1913) 227 U. S. 308; see 14 Columbia Law Rev., 429, 431.

[24]In 36 U. S. Stat. at L., at p. 826, occur the words "whether with or without her consent."

[1]Morgan *v.* Halberstadt (C. C. A. 1894) 60 Fed. 592.

[2]State *v.* Bond (1906) 12 Idaho 424, 433-435.

[3]See State *v.* Lloyd (1913) 152 Wis. 24.

other hand, becomes a witness, he by that very act waives his privilege, for, unlike other witnesses, he can refuse to testify in the first instance.[4] A difficult question consists in determining the extent or scope to be imputed to these waivers. This involves, (1) how far do they extend as to facts relevant to the issue, (2) how far as to those facts which merely affect the credibility of the witness, (3) how far as to other trials involving the same issues.

In the case of an ordinary witness, since there must be a separate waiver as to each point, the only question can be whether by answering as to fact X he has waived it as to fact Y. The American rule is that if he discloses part of a criminating transaction he thereby waives his privilege as to that particular transaction, and must disclose the whole of it;[5] while the English view is that an answer to one question never waives the privilege of demurring to others, and that at any moment he may refuse to testify further.[6] When the accused is a witness, there is more conflict of authority. Judge Cooley thinks that he should be permitted to stop at any point that he chooses, and that it must be left to the jury to determine the weight of an incomplete statement.[7] But most courts refuse to give the accused this opportunity of retiring behind his privilege when hard pressed, and they permit such cross-examination as may be necessary to extract the whole truth concerning the facts brought forward by him on his direct examination.[8] Some even go so far as to hold that the waiver extends to all facts relevant and material to the issue, and that he cannot refuse to testify to any fact which would be competent evidence if proved by other witnesses.[9]

When the accused exercises his option to testify, he occupies the somewhat incompatible positions of accused and witness, and thereby exposes himself to questions admitted to impeach his credibility, which would otherwise be excluded.[10] Thus, like other witnesses, he may be questioned, in most jurisdictions, as to former arrests or convictions for crime,[11] although evidence of other crimes is of course inadmissible on the question of his guilt or innocence. Again, it has been held that confessions obtained under such circumstances as to be otherwise inadmissible, may be introduced under the pretext of impeaching his credibility by contradicting his testimony.[12] But it must be remembered that such inquiry is admissible only to impeach him as a witness. There is always danger that the jury will be influenced by such evidence in determining the defendant's guilt; and,

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[4]Powers *v.* United States (1912) 223 U. S. 303, 314.

[5]State *v.* Bond, *supra*; see Foster *v.* People (1869) 18 Mich. 266.

[6]Regina *v.* Garbett (1847) 1 Den. C. C. 236, 258; 3 Wigmore, Evidence, § 2276.

[7]Cooley, Const. Lim. (7th ed.) 447-449.

[8]State *v.* Bartmess (1898) 33 Ore. 110; State *v.* Kent (1896) 5 N. D. 516, 547; State *v.* Bellard (1913) 132 La. 491.

[9]Commonwealth *v.* Smith (1895) 163 Mass. 411, 430 *et seq.*; People *v.* Tice (1892) 131 N. Y. 651; Guy *v.* State (1899) 90 Md. 29; People *v.* Dupounce (1903) 133 Mich. 1.

[10]People *v.* Brown (1911) 203 N. Y. 44.

[11]Connors *v.* People (1872) 50 N. Y. 240.

[12]Commonwealth *v.* Tolliver (1876) 119 Mass. 312; *contra*, Harrold *v.* Territory (C. C. A. 1909) 169 Fed. 47, overruling s. c. (1907) 18 Okla. 395; Shephard *v.* State (1894) 88 Wis. 185.

although most courts regard this as a risk which the accused assumes when he elects to take the stand,[13] they have felt constrained to evade the rule in harsh cases, with resulting confusing decisions. There are conflicts as to what crimes are admissible to discredit the witness, and also as to the extent to which he can be questioned as to the details of such crimes.[14] This confusion possibly indicates the wisdom of the policy in those jurisdictions which exclude such evidence altogether.[15] There is of course no question of self-crimination where the witness is interrogated as to past convictions for which he is no longer punishable; but where he is asked to testify to criminating facts which will render him liable to punishment for other crimes, even the accused may retire behind his privilege, for it is going too far to hold that by taking the stand, he, any more than ordinary witnesses, should agree to lay bare every criminal act of his entire life.[16]

In the case of waiver of ordinary privileges, such as that of a patient or client not to have confidential communications disclosed, the waiver is held to be general and lasting, and not limited to a particular purpose or trial.[17] When the information has been once divulged, it cannot be again concealed, and the reason for the privilege is gone. But the privilege against self-crimination is different. In the recent case of *People* v. *Cassidy* (1915) 213 N. Y. 388, the defendant had voluntarily appeared and testified before a committing magistrate as to a crime alleged to have been committed by him and other parties. At a subsequent trial of one of the parties, he asserted his privilege of refusing to testify; but the trial court compelled him to do so on the ground that he had waived his privilege. On appeal this was held to be error, and it was decided that the waiver of the privilege at the preliminary hearing did not waive it for the trial. Consequently, it was necessary to release the defendant in accordance with a statute providing that a person compelled to testify in violation of his privilege, could not thereafter be indicted or punished for the offense to which his testimony related. This decision is sound according to the great weight of authority, which even holds that testifying before a grand jury is not a waiver of the privilege at trial.[18] But although the accused cannot be compelled to testify in a second trial, his testimony previously given is admissible in evidence against him.[19] This fact suggests the distinction between the present case and the case of waiver of privileged communication above referred to. In either case, after the waiver is once given and the testimony once disclosed, it cannot be recalled. The physician

[13]See State *v.* Peck (1888) 86 Tenn. 259, 265; Connors *v.* People, *supra.*

[14]*Cf.* State *v.* Huff (1876) 11 Nev. 17; People *v.* Irving (1884) 95 N. Y. 541; People *v.* Crapo (1879) 76 N. Y. 288; People *v.* Nelson (N. Y. 1911) 145 App. Div. 680.

[15]See State *v.* Bartmess, *supra,* p. 123; State *v.* Witham (1881) 72 Me. 531, 534.

[16]See Baehner *v.* State (1900) 25 Ind. App. 597; State *v.* Kent, *supra,* pp. 551-553.

[17]People *v.* Bloom (1908) 193 N. Y. 1.

[18]Temple *v.* Commonwealth (1881) 75 Va. 892; *contra,* State *v.* Van Winkle (1890) 80 Iowa 15.

[19]Powers *v.* United States, *supra*; State *v.* Glass (1880) 50 Wis. 218; State *v.* Eddings (1880) 71 Mo. 545.

may repeat his testimony at other trials, and the criminating evidence may likewise be used at other trials. But this is the extent of the waiver in both cases, and it is very different from compelling the witness to give additional criminating evidence in new proceedings, and under different circumstances. The fact that some of this evidence may have been disclosed beyond recall is immaterial, as the question is whether the witness can be compelled to criminate himself in another trial, and not how much evidence exists against him.[20]

MARITIME LIENS.—The validity of a common law lien is conditioned upon the retention of possession by the lienor. An equitable lien is merely a charge or duty, the performance of which is enforced by a court of equity acting *in personam*.[1] A maritime lien, however, exists without possession, and is enforced in admiralty by proceedings *in rem*. It is more in the nature of what the civil law terms an hypothecation,—"The right which a creditor has in the thing of another, which right consists in the power to cause that thing to be sold, in order to have the debt paid out of the price."[2] The claim or contract out of which it arises, moreover, must be of a maritime nature, that is, must relate to the improvement or preservation of a maritime entity.[3] Services, however, are not maritime which are confined to the construction or original equipment of a vessel,[4] or which do not appertain essentially to things of the sea.[5]

Inasmuch as a ship is a wanderer, and touches at ports in foreign lands where neither the master nor the owner is acquainted, and on whose credit alone few would willingly furnish supplies or repairs to the vessel, courts of admiralty have held from the beginning that the ship was impliedly pledged for such as were necessary for the

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[20]Commonwealth *v.* Phœnix Hotel Co. (1914) 157 Ky. 180, 188-189.

[1]3 Pomeroy, Eq. Jur. (3rd ed.) § 1233.

[2]See The Young Mechanic (C. C. 1855) 2 Curtis 404, 410; Vandewater *v.* Mills (1856) 19 How. 82. It is true that an equitable lien is likewise analogous to an hypothecation, 3 Pomeroy, Eq. Jur. (3rd ed.) § 1233, but it can be enforced only by an action *in personam* and not by one *in rem* as in the case of a lien in admiralty.

[3]Bottomry bond—see The Grapeshot (1869) 9 Wall. 129. Respondentia bond—see The Julia Blake (1882) 107 U. S. 418. Salvage—see The Launberga (D. C. 1907) 154 Fed. 959. Towage—see The J. W. Tucker (D. C. 1884) 20 Fed. 129; The Mystic (D. C. 1886) 30 Fed. 73; *contra*, James Dalzell's Son & Co. *v.* The Daniel Kaine (D. C. 1887) 31 Fed. 746; see The J. Doherty (D. C. 1913) 207 Fed. 997. Repairs—The Thomas W. Rodgers (D. C. 1912) 197 Fed. 772, affd. (C. C. A. 1913) 207 Fed. 69; The O. H. Vessels (D. C. 1910) 177 Fed. 589, affd. (C. C. A. 1910) 183 Fed. 561. Supplies—see Saylor *v.* Taylor (C. C. A. 1896) 77 Fed. 476. Seamen's wages—The L. L. Lamb (D. C. 1887) 31 Fed. 29. Advances—The Emily Souder (1873) 17 Wall. 666. The lien for advances is classified according to the rank of the lien discharged. The Wyoming (D. C. 1888) 36 Fed. 493. Stevedores' services—Luckenbach *v.* Pearce (C. C. A. 1914) 212 Fed. 388.

[4]Construction contract—People's Ferry Co. etc. *v.* Beers (1857) 20 How. 393; Edwards *v.* Elliott (1874) 21 Wall. 532. Original equipment—The United Shores (D. C. 1912) 193 Fed. 552.

[5]Watchmen—McGinnis *v.* The Grand Turk (D. C. 1862) Fed. Cas. 8800; 14 Columbia Law Rev., 163. Mortgages—The Lottawanna (1874) 21 Wall. 558; see The J. E. Rumbell (1893) 148 U. S. 1.

continuance of the voyage. Where, however, the necessaries were furnished at the home port, there was a presumption that credit was extended to the owner personally, and no lien recognized by courts of admiralty, resulted.[6] In order to harmonize the law as to services rendered in the home port with that as to services rendered in a foreign port, state statutes were generally enacted providing a lien under such circumstances. The Constitution vests in the federal courts power over "all cases of admiralty and maritime jurisdiction."[7] It necessarily follows that the States are prohibited from entertaining jurisdiction of any cause of action of a maritime nature which involves a procedure analogous to that enforced in courts of admiralty.[8] There is no constitutional prohibition, however, which prevents the States from providing for, and enforcing, claims which are not of a maritime character. In fact, it was for that very reason that state statutes authorizing liens enforcible in state courts for the construction of a vessel, were upheld.[9] But as the nature of a lien for services rendered in the home port of a vessel is maritime, the States were prevented from enforcing statutes authorizing liens under such circumstances.[10] It seems that the federal courts should likewise have refused to recognize such laws. By reason of various changes in the Twelfth Admiralty Rule, however, supplemented by anomalous reasoning, the federal courts assumed jurisdiction to enforce liens for supplies and repairs furnished in the home port where such a lien was authorized by a state law.[11] A federal statute, enacted in 1910, abrogated this rule and made provision for a uniform lien for maritime services whether rendered in a foreign or a home port.[12] In the recent case of *The Dredge A* (D. C. E. D. N. C. 1914) 217 Fed. 617, it was held

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[6]8 Columbia Law Rev., 316. A stevedore has no lien for services rendered in the home port. The Gilbert Knapp (D. C. 1889) 37 Fed. 209. Where the vessel is supplied in her home port and representations are made to the effect that the vessel is foreign, a lien by estoppel arises. See The St. Jago de Cuba (1824) 9 Wheat. 409, 417; The Brig E. A. Barnard (C. C. 1880) 2 Fed. 712. The master of a vessel is not entitled to a lien, as he is presumed to have contracted with the owner personally and not on the credit of the ship. The Steamboat Orleans *v.* Phoebus (1837) 11 Pet. 175.

[7]U. S. Const., Art. 3, § 2.

[8]The Glide (1897) 167 U. S. 606. State courts have jurisdiction over maritime actions if they are *in personam*. Leon *v.* Galceran (1870) 11 Wall. 185.

[9]Edwards *v.* Elliott, *supra*; The Winnebago (C. C. A. 1905) 141 Fed. 945, affd. (1907) 205 U. S. 354. Federal courts will not enforce such statutes. Roach *v.* Chapman (1859) 22 How. 129.

[10]The Lottawanna, *supra*.

[11]Hughes, Admiralty, § 49.

[12]36 U. S. Stat. at L. 604. The statute supersedes all state laws on the subject. The Ha Ha (D. C. 1912) 195 Fed. 1013; see The Saratoga (C. C. A. 1913) 204 Fed. 952. The few cases which have arisen under the act seem to hold that the hitherto established rules as to what are maritime services remain unaltered. The J. Doherty, *supra*; The Strathnairn (D. C. 1911) 190 Fed. 673; The United Shores, *supra*; The Rupert City (D. C. 1914) 213 Fed. 263; nor does the statute affect the question of priorities. The Towanda (D. C. 1914) 215 Fed. 232. It reverses the rule as to credit, however, by authorizing the presumption that credit was extended to the vessel rather than to the owner. Ely *v.* Murray etc. Co. (C. C. A. 1912) 200 Fed. 368.

that notwithstanding the broad terms of this statute, it applied to those services alone which were in their nature maritime, and therefore did not authorize the federal courts to enforce a lien for the construction and equipment of a vessel performed in her home port.

Contrary to the rule at common law, liens enforcible in admiralty rank according to the inverse order of their dates.[13] This doctrine is based on the practical reasoning that a service rendered to a vessel tends to the preservation of the *res* without which previous lienors might lose their security.[14] A lien for a tort committed by a vessel is subject to the identical rules of priority which govern liens for services, on the theory that one who equips or supplies a vessel and then permits it to sail forth, holds his lien liable to any claim for damages to which the ship, as a wrongdoer, may subsequently subject itself.[15] Where liens are concurrent, their priority is based on the relative merits of the various claims; a lien for salvage, for instance, has precedence over a lien for wages,[16] and a claim for seamen's wages outranks one for towage,[17] or supplies.[18]

As a maritime lien is a secret lien and is enforcible against the vessel even after she reaches the hands of an innocent purchaser, it is only fair that it be required to be enforced with the utmost diligence, and failure to do so renders the lien stale as to subsequent purchasers or lienors of the vessel, on the same theory that laches is a bar to an action in equity.[19] The question of diligence is one of fact under all the circumstances of each case, and in this connection, the speed of the particular vessel, the frequency with which it touches at the same port, and the opportunities offered to libel it, should all be taken into consideration.[20] It is practically impossible to evolve any inflexible

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[13]2 Jones, Liens (3rd ed.) § 1777.

[14]See The J. W. Tucker, *supra*. Seamen's wages earned subsequent to salvage supersede claims for the latter; Dalstrom *v.* The Schooner "E. M. Davidson" (D. C. 1880) 1 Fed. 259; but not where earned prior to the salvage. See The City of Tawas (D. C. 1880) 3 Fed. 170.

[15]The America (D. C. 1909) 168 Fed. 424; The F. H. Stanwood (C. C. A. 1892) 49 Fed. 577. It is held, by the weight of authority, that a tort is not maritime unless committed on the water. 5 Columbia Law Rev., 312; 8 Columbia Law Rev., 499.

[16]The Athenian (D. C. 1877) 3 Fed. 248.

[17]The City of Tawas, *supra*. An advance to pay off seamen's wages outranks a bottomry bond. The Dora (C. C. 1888) 34 Fed. 348. It was once thought that the lienor who first attached the vessel had a priority; The Triumph (D. C. 1841) Fed. Cas. 14182; The Globe (C. C. 1852) Fed. Cas. 5483; but this view has long since been discarded. The J. W. Tucker, *supra*. A tort claim ranks equally with a bottomry bond and a lien for supplies, but is inferior to a lien for seamen's wages. The America (D. C. 1853) Fed. Cas. 288. In all cases, a maritime lien takes precedence over a non-maritime lien. The J. E. Rumbell, *supra*; Baldwin *v.* The Bradish Johnson (C. C. 1878) Fed. Cas. 798.

[18]The America (D. C. 1853) Fed. Cas. 288.

[19]The Ella (D. C. 1897) 84 Fed. 471; The Harriet Ann (D. C. 1874) Fed. Cas. 6101.

[20]Blaine *v.* The Ship Charles Carter (1808) 4 Cranch 328; The Tiger (D. C. 1898) 90 Fed. 826; see The Chusan (C. C. 1843) Fed. Cas. 2717. A lien may be waived either expressly, The Half Moon (D. C. 1891) 46 Fed. 812, or impliedly, as by taking a mortgage on the vessel and a note extending over the period within which the lien is allowed by maritime law. The Nebraska (C. C. A. 1895) 69 Fed. 1009; The Lucille (D. C. 1913) 208 Fed. 424. The mere taking of a note is not such a waiver. The Chusan, *supra*; The Emily Souder, *supra*.

rule from the many decided cases on the subject, as courts of admiralty are greatly influenced by equitable considerations and the special circumstances of the particular case, which outweigh the broad underlying principles governing the subject.[21] In fact, the declaration that in dealing with this question "each court is a law unto itself", well explains the seeming conflict of authorities.[22]

Representation of Persons Not in Esse.—It is a rule in equity that all persons materially interested in the subject-matter of the suit should be made parties thereto, so that there may be a complete decree binding on all.[1] A limitation upon this rule is expressed by the doctrine of representation. Under one phase of this doctrine, parties to a litigation concerning realty will be deemed to represent persons not *in esse* so that they are bound by the judgment, if it appears that because of a similarity of interest the latter's rights will be fully protected.[2] This power to deal with property in which persons not *in esse* may have expectant estates, is inherent in a court of equity and exists independent of statute.[3] It may be said to be the result of convenience, or even of necessity, since otherwise property subject to expectant estates would be tied up for indefinite periods, all improvement would be checked, and the rights of the present generation would be needlessly sacrificed for those of a possible posterity.[4]

From an early date, there have been differences of judicial opinion as to when the future interests of unborn persons are properly represented. In England, it has been held that a judgment of partition against one seized of a fee defeasible by a shifting use, executory devise, or conditional limitation, cannot bind the expectant estates of those not *in esse*.[5] In this country, however, it matters not that

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[21]Hughes, Admiralty, § 175.

[22]See The City of Tawas, *supra*, p. 172. An example of the confusion in this phase of the law is illustrated by cases in which there is a conflict of laws. *Cf.* The Union (1860) Lush. 128; The Enterprise (D. C. 1870) 1 Low. 455. The existence of a lien is determined by the *lex loci contractus*. The Barque Havana (D. C. 1858) 1 Sprague 402; The Maud Carter (D. C. 1886) 29 Fed. 156. A maritime tort committed in one country gives a cause of action in the courts of a foreign nation; Panama R. R. *v.* Napier Shipping Co. (1897) 166 U. S. 280; but it has been suggested that it must first be shown that the tort is actionable in both jurisdictions. See Carr *v.* Fracis Times & Co., L. R. [1902] A. C. 176, 182.

[1]See Gregory *v.* Stetson (1890) 133 U. S. 579, 586.

[2]Gavin *v.* Curtin (1898) 171 Ill. 640; Baylor's lessee *v.* Dejarnette (Va. 1856) 13 Gratt. 152.

[3]Ridley *v.* Halliday (1901) 106 Tenn. 607. The legislature, as *parens patriae*, may, by special act, authorize the sale of the contingent rights of those not *in esse*. See Brevoort *v.* Grace (1873) 53 N. Y. 245. In Massachusetts, a statute provides for the appointment of a guardian *ad litem* to insure the protection of such interests. See Loring *v.* Hildreth (1898) 170 Mass. 328.

[4]See Bolfil *v.* Fisher (S. C. 1850) 3 Rich. Eq. 1; Hale *v.* Hale (1893) 146 Ill. 227.

[5]Goodess *v.* Williams (1843) 21 Eng. Ch. *595; but see Giffard *v.* Hort (1804) 1 Sch. & Lef. 386.

the estate of the representative is liable to be so defeated;[6] and it is sufficient to bring in the one entitled to the first estate of inheritance[7] or, if there be no one answering this description, then the life tenant may be treated as representing future interests.[8] There is some authority for the proposition that only those of the same class can represent persons not *in esse*; so where land was devised to the testator's daughter for life, remainder to those children who survived her, since it could not be determined that any children would survive, there could be no partition until the death of the life tenant.[9] It would seem, however, that the question of representation should not be determined so much by the character of the estate of the parties litigant, as by whether their interests are so closely related to those persons not *in esse* that the latter's rights would be fully protected.[10] If the proceeding is to foreclose a mortgage, or if a claim to property is set up in conflict with that of the common grantor, since all claiming estates through the grantor are united in interest, there is sufficient representation of the rights of persons not *in esse* if all the interested living parties are joined in the suit.[11] Similarly, persons not *in esse* may be bound by a judgment in an action to construe a will.[12]

In the recent case of *Adami* v. *Gercken* (N. Y. 1914) 164 App. Div. 472, an action for specific performance, the defense set up was that the plaintiff's title as purchaser under judgment in a partition suit was defective, since the contingent interests of those not *in esse* had not been cut off. The property in question had been devised by a testator to his wife for life, and he directed that after her death the estate should be divided among his children, or their issue, when his youngest child became twenty-one years old, or died. Immediately after the death of the widow and before the death of the youngest child, the testator's children, who claimed sole title to the property, obtained a decree for partition without making any of the living grandchildren parties to the suit, and the property was sold to the plaintiff. Subsequent to the partition proceedings and prior to the death of the youngest child, which occurred before he reached twenty-one years of age, other grandchildren were born, some of whom survived their parents who died before the death of the youngest child.

[6] See Mead *v.* Mitchell (1858) 17 N. Y. 210; Rutledge *v.* Fishburne (1902) 66 S. C. 155; Dunham *v.* Doremus (1897) 55 N. J. Eq. 511.

[7] Miller *v.* Texas & P. R. R. (1890) 132 U. S. 662.

[8] Sparks *v.* Clay (1904) 185 Mo. 393; Carneal *v.* Lynch (1895) 91 Va. 114; Freeman *v.* Freeman (Tenn. 1872) 9 Heisk. 301. In Downin *v.* Sprecher (1871) 35 Md. 474, representation was limited to one having an estate of inheritance; but this rule in Maryland has been changed by statute. See Downes *v.* Long (1894) 79 Md. 382.

[9] *Ex parte* Miller (1884) 90 N. C. 625. By a statute passed in 1903, this limitation is no longer the law in North Carolina. See Springs *v.* Scott (1903) 132 N. C. 548.

[10] *Cf.* McArthur *v.* Scott (1884) 113 U. S. 340; Hale *v.* Hale, *supra.*

[11] Mortgage foreclosures—McCampbell *v.* Mason (1894) 151 Ill. 500; Rutledge *v.* Fishburne, *supra*; Dunham *v.* Doremus, *supra.* Conflicting claims to property—Kent *v.* Church of St. Michael (1892) 136 N. Y. 10. In cases of strict partition, the interest of those coming after the particular estate is merely changed from an estate in common to an estate in severalty; or if the partition results in a sale, they have a corresponding interest in the proceeds. See McArthur *v.* Scott, *supra,* p. 401.

[12] Tonnele *v.* Wetmore (1909) 195 N. Y. 436.

The court held that the title obtained by the partition and sale proceedings was defective, since the contingent interests of the grandchildren not then *in esse,* who later took under the will, had not been properly represented. By statute in New York, expectant estates of persons, whether *in esse* or not, may be bound by a judgment of partition.[13] But it is also the rule in New York that a sale which is the result of partition proceedings will not be effective as to contingent interests of persons not *in esse,* unless the judgment provides for and protects such interests by substituting and preserving a fund commensurate in value with them.[14] No such provision having been made in the principal case, the judgment in the partition suit did not bar the estates in expectancy of the unborn grandchildren. Aside from this, however, there was no representation of the grandchildren not *in esse,* since the children, who might under ordinary circumstances properly represent such future rights, refused to recognize any contingent interests and divided the property among themselves on the theory of complete ownership, so that the rights of the children instead of being practically identical with, were actually hostile to, those of the grandchildren.[15]

Forcible Entry and Detainer.—Forcible entry and detainer, though commonly alleged in the same complaint, are, in most jurisdictions, separate and distinct torts.[1] Two fundamental requisites underlie both actions: the plaintiff must have been in actual, peaceable possession of the premises,[2] and he must have been ousted from that possession by the forcible entry, or the forcible detainer, charged against the defendant.[3] Under this state of facts, relief is granted on the theory that the disturbance of any peaceable possession tends to breach of the peace;[4] and since this result accrues irrespective of the relative rights of the parties, legal title to the premises cannot be interposed as a defense to these actions.[5]

In the absence of express statutory provision, no particular duration of plaintiff's possession is required,[6] but it must have been exclusive and not scrambling.[7] The plaintiff need not have actually

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[13]N. Y. Code of Civ. Proc., § 1557. For a discussion of the procedure for partition under the N. Y. Code, see article by Surrogate Robert L. Fowler in 3 Columbia Law Rev., 295.

[14]Monarque *v.* Monarque (1880) 80 N. Y. 320.

[15]See Downey *v.* Seib (1906) 185 N. Y. 427.

[1]Shelby *v.* Houston (1869) 38 Cal. 410; see Fults *v.* Munro (1911) 202 N. Y. 34.

[2]Brooks *v.* Warren (1886) 5 Utah 118; Hopkins *v.* Calloway (1855) 35 Tenn. 11.

[3]Schmidberger *v.* Bloner (N. Y. 1892) 66 Hun 527.

[4]See 2 Cooley, Torts (3rd ed.) 663.

[5]Stephens *v.* McCloy (1873) 36 Iowa 659; Sitton *v.* Sapp (1895) 62 Mo. App. 197; Hammond *v.* Doty (1900) 184 Ill. 246. But the question of title may come up as a collateral issue, as where an occupant under color of title to an entire tract of land, takes open, visible possession of some definite part, thereby gaining constructive possession of the whole. Seals *v.* Williams (1902) 80 Miss. 234.

[6]Cain *v.* Flood (1891) 14 N. Y. Supp. 776, affd. (1893) 138 N. Y. 639.

[7]Blake *v.* McCray (1888) 65 Miss. 443; Brooks *v.* Warren, *supra.*

resided on the premises,[8] for possession may be maintained by agents or tenants, by personal chattels kept on the premises,[9] or, according to the better view, by merely securing the entrances in such a manner as to manifest an intention to exercise continued dominion.[10]

On all questions of sufficiency of possession the courts are fairly well agreed, but in the determination of the amount of force necessary to support the actions, there is utter confusion. Many States still adhere to the old definition of force, developed in criminal actions,[11] that mere trespass is insufficient and that there must be actual or threatened violence to the person of the occupant or manifestations of a determination to exercise force sufficient to place the occupant in fear of imminent peril should he offer resistance.[12] An increasingly large number of States, however, give summary relief against a defendant who has entered against the will of the occupant,[13] or without his consent,[14] or under other circumstances not amounting to actual or threatened violence.[15] This change is largely due to the insertion of the word "unlawful" in the statutes. In some cases, the interpretation necessarily raises the question of title, and thus makes the action a substitute for ejectment.[16]

In the recent case of *Hammond Savings & Trust Co.* v. *Boney* (Ind. 1915) 107 N. E. 480, the plaintiff was a sub-tenant under an expired lease, holding over after notice to quit. The defendant, owner of the premises, entered during the plaintiff's absence, barricaded the doors and forcibly resisted the plaintiff's attempt to re-enter. The court held that the entry, though peaceable when made, was so qualified by the subsequent acts of the defendant as to render it forcible within the meaning of the statute. The decision is not fully sup-

[8]Shelby *v.* Houston, *supra*; Zuercher *v.* Startz (1909) 53 Tex. Civ. App. 442. Although mere temporary or occasional absence will not justify the presumption of abandonment, the presumption may arise from continued absence coupled with other circumstances indicating an intention to abandon. Hopkins *v.* Calloway, *supra*.

[9]Lorah *v.* Emmerson (1907) 154 Ala. 145; Hammond *v.* Doty, *supra*.

[10]Sitton *v.* Sapp, *supra*; *contra*, Hopkins *v.* Buck (1820) 10 Ky. *110.

[11]For an historical account of the early statutes and the development of the criminal action, see 2 Wharton, Criminal Law, *1554, *et seq.*

[12]Saunders *v.* Robinson (Mass. 1842) 5 Metc. 343; Richter *v.* Cordes (1894) 100 Mich. 278, 285; Mastin *v.* May (Minn. 1914) 148 N. W. 893; Berry *v.* Williams (1848) 21 N. J. L. 423; Fults *v.* Munro, *supra*; Iron Mountain etc. R. R. *v.* Johnson (1887) 119 U. S. 608; Smith *v.* Reeder (1892) 21 Ore. 541; Foster *v.* Kelsey (1863) 36 Vt. 199. And in some jurisdictions, this interpretation of the law has persisted even where the phraseology of the statutes might easily have led to a different result. See Miller *v.* Plummer (1912) 105 Ark. 630; Carter *v.* Van Dorn (1874) 36 Wis. 289. It is also essential that the force be exercised with manifest intent to oust the occupant. See Castro *v.* Tewksbury (1886) 69 Cal. 562; Rouse *v.* Dean (1845) 9 Mo. 301.

[13]Hammond *v.* Doty, *supra*; Seals *v.* Williams, *supra*; Tolbert *v.* Hendrick (1898) 77 Mo. App. 272.

[14]Dutchers *v.* Sanders (Cal. 1912) 129 Pac. 809; Young *v.* Young (1900) 109 Ky. 123, 129; Feder *v.* Hager (1908) 64 W. Va. 452.

[15]Lorah *v.* Emmerson, *supra*; Wells *v.* Darvy (1893) 13 Mont. 504; Post *v.* Bohner (1888) 23 Neb. 257; Bilby *v.* Brown (1913) 41 Okla. 98; Cleage *v.* Hyden (1871) 15 Tenn. 73, 79; see Emsley *v.* Bennett (1873) 37 Iowa 15; Campbell *v.* Coonradt (1879) 22 Kan. 504.

[16]See Post *v.* Bohner, *supra*.

ported by the authorities it cites and overlooks the real issue. The defendant had actual, peaceable possession as soon as he had gained access to the room and had barricaded the doors;[17] and the peaceable character of his entry could not be affected by the relation back of any subsequent acts.[18] There remained the sole question, not considered by the court, of forcible detainer; and this presents considerable difficulty. On the one hand, it is recognized that one who has title to land and is in peaceable possession thereof may defend his possession by force.[19] On the other hand, we are confronted by the rule that no question of title will be heard. It would seem that the only just and satisfactory solution of this difficulty lies in allowing title to be pleaded where there has been a forcible detainer after a peaceable entry,[20] although it is equally manifest that such a plea should furnish no defense to an allegation of forcible entry in any jurisdiction where forcible still means forcible, and not merely unlawful.

Constitutionality of Blue Sky Laws.—A desire to stop the sale of fraudulent securities[1] has of late years resulted in a number of States in legislation known as Blue Sky Laws.[2] These usually provide that before stocks or bonds may be sold in the State, the seller must file a statement of solvency and a description of the securities to be sold with some officer, who shall forbid the sale of any or all of the investments offered if they seem to him unlikely to return a reasonable income. As a rule, all sales are forbidden for thirty days after the filing of such information, and the seller is required to pay a license fee, to make annual financial reports, and, if a non-resident, to agree to accept the service of process on some state officer as personal service. In Florida, such a statute expressly applied only to corporations, and was held constitutional on the ground that the legislature could regulate domestic corporations which it created, and could prescribe the terms on which foreign corporations might do business in the State.[3] The West Virginia statute, however, which was under consideration in the recent case of *Bracey* v. *Darst* (D. C. N. D. W. Va. 1914) 218 Fed. 482, applied not only to corporations but also to individuals

[17]The cases cited in which the defendant, after coming peaceably upon the premises, forcibly expels the plaintiff, are not in point. An entry is never complete until the occupant is actually excluded from the premises. Edwick *v.* Hawkes, L. R. [1881] 18 Ch. Div. 199.

[18]Tischler *v.* Knick (N. Y. 1899) 26 Misc. 738; Hoffman *v.* Harrington (1870) 22 Mich. 52; Richter *v.* Cordes, *supra.*

[19]Towell *v.* Edder (1900) 69 Ark. 34; Potter *v.* Mercer (1879) 53 Cal. 667, 674.

[20]See Feder *v.* Hager, *supra.*

[1]See Alabama & N. O. Trans. Co. *v.* Doyle (D. C. 1914) 210 Fed. 173.

[2]Such statutes have been enacted or considered in twenty-three States. See C. A. Dykstra, Blue Sky Legislation, 7 American Political Science Rev., 230, where the different provisions of the various statutes are indicated.

[3]*Ex parte* Taylor (Fla. 1914) 66 So. 292. Corporations are not citizens under Art. 4, § 2, of the Constitution, providing that citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States; Paul *v.* Virginia (1868) 8 Wall. 168; and as the domestic corporation involved was organized after the enactment of the law, no question as to the impairment of charter rights arose.

dealing in securities, and was held unconstitutional as depriving individuals of their property without due process of law, denying them the equal protection of the laws, and imposing a restraint on interstate commerce.[4]

To be sure, the right to buy and sell is one of the privileges of citizenship,[5] subject only to such regulation under the police power as may be necessary for the public welfare. But in its delegation of discretion to the auditor of the State to stop the sale of securities which he regards as a poor investment, the West Virginia statute strikes not only at fraudulent enterprises, but places all legitimate financing at his mercy, which seems clearly to exceed the police power.[6] Even if legislation of this sort is unobjectionable in other respects, its validity may still be questioned on the ground that it imposes a direct burden[7] upon interstate commerce in violation of the Commerce Clause.[8] It was held in an early case that foreign bills of exchange, which being choses in action are analogous to stocks and bonds,[9] are not subjects of interstate commerce.[10] But the scope of the Commerce Clause has been extended somewhat to meet new mercantile conditions and to include new agencies of intercourse,[11] and the fact that choses in action are generally regarded as personal property[12] would seem to justify the courts in regarding trade in stocks and bonds as commerce. The great increase in the importance of industrial corporations, moreover, has made it highly desirable that their securities should command a ready market. Consequently, it is to be hoped that transactions in stocks and bonds will be accorded the protection of the Commerce Clause against burdensome state regulations.[13]

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[4]The dissent of Woods, J., was based entirely on the contention that the statute should be interpreted as not applying to individuals.

[5]See 8 Columbia Law Rev., 132.

[6]Alabama & N. O. Trans. Co. *v.* Doyle, *supra*; *cf.* 27 Harvard Law Rev., 741.

[7]Indirect burdens may be laid by the States on interstate commerce under the police power. Savage *v.* Jones (1912) 225 U. S. 501, 525; see 9 Columbia Law Rev., 66.

[8]U. S. Const., Art. 1, § 8.

[9]Cook, Corporations, § 12.

[10]Nathan *v.* Louisiana (1850) 8 How. 73; see 79 Central Law Journ., 387; 80 Central Law Journ., 175.

[11]*E. g.*, the telegraph, W. U. Tel. Co. *v.* Pendleton (1887) 122 U. S. 347; the telephone, Muskogee Nat. Tel. Co. *v.* Hall (C. C. A. 1902) 118 Fed. 382; see 14 Columbia Law Rev., 147, and traffic in lottery tickets, Lottery Case (1903) 188 U. S. 321; but see N. Y. Life Ins. Co. *v.* Deer Lodge County (1913) 231 U. S. 495; 14 Columbia Law Rev., 149.

[12]Williams, Personal Property (17th ed.) 29.

[13]William R. Compton Co. *v.* Allen (D. C. 1914) 216 Fed. 537; Alabama & N. O. Trans. Co. *v.* Doyle, *supra*; *cf.* Frederick H. Cooke, 58 Pennsylvania Law Rev., 411.

RECENT DECISIONS.

Arnold Brock, *Editor-in-Charge.*
Cyril J. Curran, *Associate Editor.*

Adjoining Landowners — Lateral Support — New York Building Code.—The Building Code of New York City, § 22, provides that all persons intending to excavate to a depth of more than ten feet below the curb shall from the commencement to the completion of the excavation preserve adjoining structures from injury. The defendant notified the building department of an intention to excavate more than ten feet, and proceeded to remove her old building, but stopped work upon reaching the bottom of its foundation walls nine feet below the curb. The plaintiff now sues for expenses incurred by him in shoring up his house to prevent it from being injured by the defendant's act. *Held,* one judge dissenting, he can recover. *Wear* v. *Koehler* (Sup. Ct. App. Term 1914) 88 Misc. 109.

Within the limits of New York City the ordinance cited has the force of a statute passed by the legislature. See City of New York *v.* Trustees (N. Y. 1903) 85 App. Div. 355. It places upon persons intending to excavate to a greater depth than ten feet the duty of making proper provision for the safety of adjoining buildings, not only after that depth has been reached but throughout the entire progress of the work, *Foster* v. *Zampieri* (N. Y. 1910) 140 App. Div. 471, and of leaving such buildings as safe after the excavation as they were before. *Bernheimer* v. *Kilpatrick* (N. Y. 1889) 53 Hun 316. Since the duty imposed is absolute, liability for failure to perform does not depend upon negligence, *Post* v. *Kerwin* (N. Y. 1909) 133 App. Div. 404, and cannot be shifted to an independent contractor. *Rosenstock* v. *Laue* (N. Y. 1910) 140 App. Div. 467; *cf. Bloomingdale* v. *Duffy* (N. Y. 1911) 71 Misc. 136. The judge dissenting in the principal case was of the opinion that until the defendant had removed all structures resting upon her land and had begun to dig below the level of their old foundations, she could not be said to have commenced "an excavation of either earth or rock" within the meaning of the act. While such a construction may be literally exact, § 2 of the Building Code declares that ordinance to be remedial and directs the courts to construe it liberally, and it therefore seems proper to include within the excavations affected by the Code any removal of the various subterranean structures with which the original soil has been replaced throughout a large portion of the city.

Admiralty—Maritime Liens.—The claimant sought a lien on a vessel for services rendered in its construction and original equipment. *Held,* construing 36 U. S. Stat. L. 604, that a lien did not exist. *The Dredge A.* (D. C. E. D. N. C. 1914) 217 Fed. 617. See Notes p. 343.

Automobiles—Markers—Failure to Attach.—The defendant paid the license fee for his automobile and was allotted a number, but failing to receive his marker from the Secretary of State, he operated his automobile one month later with the old marker still attached. *Held,* he could not be fined for running without the new marker, although a statute expressly required it. *State* v. *Gish* (Ia. 1914) 150 N. W. 37.

It is said that possession of a license is required for the purpose of enforcing payment of the license fee, and accordingly, it has been held that a defendant who has paid for and been granted a liquor license will not be fined for selling liquor before he actually receives the license. *State* v. *White* (1861) 23 Ark. 275. In some cases, a payment subsequent to the sale has been a defense where the license was antedated to cover the period of sale. *Bannoy* v. *State* (1878) 64 Ind. 447; *City Council* v. *Corleis* (S. C. 1831) 2 Bail. 186. This extension can be justified, however, only on the theory that the license has really been granted before the sale, and is not otherwise justifiable. *Elsberry* v. *State* (1875) 52 Ala. 8; *State* v. *Raymond* (1892) 12 Mont. 226. But where actual possession of the license is necessary to prevent an evasion of payment of the license fee, the same policy requires that the defendant should have the license in his possession. *Lewis* v. *Dugar* (1884) 91 N. C. 16. Where no payment has been made, there is no reason for allowing the defendant to excuse himself, even when he has tendered the fee to the proper official and been wrongfully refused. *State* v. *Myers* (1876) 63 Mo. 324. The statute in the principal case was intended to secure the payment of the license fee and to furnish identification of the automobile. Both of these purposes were accomplished by the defendant's payment of the fee and his use of the old marker, and if the theory of the foregoing cases is to be regarded as sound, it would seem that after waiting a reasonable time for the new markers, he was entitled to operate his machine. Such a construction has the effect, however, of overcoming the express intention of the legislature, and while it may be reasonable to suppose that the legislature did not intend to prohibit his use of his car where he was not in default, it might have been better policy to find the defendant guilty and to consider his payment of the fee as a ground for suspension of sentence.

Carriers—Liability of Connecting Carriers—Carmack Amendment.—In an action by a shipper against a connecting carrier for negligently injuring the plaintiff's horses in violation of its contract of transporation, *held,* the Carmack Amendment, 34 U. S. Stat. L., 595, to the Interstate Commerce Act, does not deprive the holder of a bill of lading of his right to sue a connecting carrier. *Elliott* v. *Chicago, Milwaukee & St. Paul Ry.* (S. Dak. 1915) 150 N. W. 777.

The English rule is, that in a through shipment only one contract arises, namely that between the shipper and the initial carrier, *Coxon* v. *Great Western Ry.* (1860) 5 Hurl. & N. *274, and that the connecting carrier is the agent of the initial carrier, and not such a party to the contract of carriage as may be sued directly by the shipper. *Bristol etc. Ry.* v. *Collins* (1858) 7 H. L. C. *194; *Mitton* v. *Midland Ry.* (1859) 4 Hurl. & N. *614. Although this view seems correct on principle, practically all American jurisdictions have allowed a recovery against the connecting carrier as well. Elliott, Railroads § 1441; *contra, Southern Ex. Co.* v. *Shea* (1868) 38 Ga. 519. Since, by the enactment of the Carmack Amendment, Congress intended to supersede all state statutes and regulations controlling the liability of interstate carriers, *Adams Ex. Co.* v. *Croninger* (1912) 226 U. S. 491, it might be urged that they also intended to supersede the common law of particular states on that subject, but no case has gone to this extent, and all remedies not actually inconsistent with the federal Interstate Commerce Act must be conceded still to remain in force until Congress

by express enactment has taken exclusive control of the subject. *Savage* v. *Jones* (1911) 225 U. S. 501, 533; *W. U. Tel. Co.* v. *Call Pub. Co.* (1900) 181 U. S. 92. As there is no federal common law as distinguished from that of the particular States, *W. U. Tel. Co.* v. *Call Pub. Co., supra,* if it were determined that the common law of the States is superseded by the Carmack Amendment, an action such as that in the principal case could be maintained only on the ground that upon the transfer of control of the liability of interstate carriers to the federal government, the common law applicable to such liability was also transferred to the federal jurisprudence. See 7 Columbia Law Rev. 199. The principal case, in regarding the remedy provided in the Carmack Amendment as cumulative rather than exclusive, *Uber* v. *Chicago etc. Ry.* (1913) 151 Wis. 431; *Otrich* v. *St. Louis etc. Ry.* (1910) 154 Mo. App. 420, is clearly correct.

Carriers—Rejection of Goods by Consignee—Notice to Consignor.—Four days after the refusal of the consignee to accept a shipment of tomatoes, the carrier sold them at a loss without giving notice to the shipper, which would have required one day's time. *Held,* to relieve itself of its obligations as common carrier, the railroad should notify the consignor of the consignee's refusal to accept the goods, and the sale cannot be justified, if not required by the perishable nature of the goods, unless such notice is impossible. *Sauer* v. *Lehigh Valley R. R.* (Sup. Ct. App. Term, 1915) 150 N. Y. Supp. 977.

If a consignee refuses to accept goods, it is generally recognized that the carrier ceases to be subject to a carrier's liability and becomes a warehouseman, but some courts hold that this change in position cannot be effected until the carrier has notified the consignor or owner. *Nashville etc. Ry.* v. *Dreyfuss-Weil Co.* (1912) 150 Ky. 333; 2 Hutchison, Carriers (3rd ed.) § 721. Other courts indicate that such duty falls on the carrier in his capacity as warehouseman. *American Sugar Refining Co.* v. *McGhee* (1895) 96 Ga. 27. But the better view seems to be that there is no rule of law requiring notice, *Gregg* v. *Illinois Cent. R. R.* (1893) 147 Ill. 550; *Grossman* v. *Fargo* (N. Y. 1876) 6 Hun 310, although the circumstances of a particular case may be such as to justify a jury in deciding that failure to notify amounted to a breach of the carrier's duty to the owner. *Fine* v. *Barrett* (N. Y. 1913) 81 Misc. 234; see *Manhattan Shoe Co.* v. *Chicago, etc. R. R.* (N. Y. 1896) 9 App. Div. 172; *Kremer* v. *Southern Express Co.* (1869) 46 Tenn. 356. In selling the goods, however, the carrier is justified only by necessity, *Rankin* v. *Memphis etc. Packet Co.* (1872) 56 Tenn. 564; *Hull & Co.* v. *Missouri Pac. Ry.* (1895) 60 Mo. App. 593, and it is said that the carrier in such a case acts as agent for the owner. *Alabama etc. R. R.* v. *McKenzie* (1913) 139 Ga. 410; *Missouri etc. Ry.* v. *Cox* (Tex. 1912) 144 S. W. 1196. Certainly no necessity for the sale of articles, even of a perishable nature, would appear where the carrier had an opportunity to notify the owner, but failed to do so. *Missouri etc. Ry.* v. *Groce* (Tex. 1908) 106 S. W. 720; *Missouri etc. Ry.* v. *Cox, supra.* The principal case in laying down this rule seems sound, even though the New York Statute authorizing the sale of goods by carriers makes no mention of notice to the consignor. N. Y. Railroad Law, § 68.

Corporations — Torts — Liability of Stockholders.—A corporation of which the defendants were stockholders converted machinery belonging to the plaintiff. The stockholders were sued under a statute

rendering them liable to creditors to the amount of capital stock not paid in. *Held,* this liability did not include claims for tort. *Howard* v. *Long* (Ga. 1914) 83 S. E. 852.

Since the individual liability of stockholders is wholly statutory, see *Terry* v. *Little* (1879) 101 U. S. 216; 4 Thompson, Corporations, § 4725, special attention must be given to the language of the statute imposing it. Where the statutes are penal in nature, imposing a liability for the debts of the corporation because of some act or omission of the directors, they are strictly construed, and are held to include liability only for claims based on contract. *Chase* v. *Curtis* (1885) 113 U. S. 452; *Cable* v. *McCune* (1858) 26 Mo. 371. And even where the statutes are remedial, the term debts is generally held not to include liability for tort, on the ground that the purpose of the statutes is only to protect persons dealing with the corporation and relying on its credit. *Child* v. *Boston etc. Iron Works* (1884) 137 Mass. 516; *Heacock* v. *Sherman* (N. Y. 1835) 14 Wend. 58. Nor is a judgment rendered against the company in a tort action a debt within the purview of such statutes, *Savage* v. *Shaw* (1907) 195 Mass. 571; *Chase* v. *Curtis, supra*; but see *Cohen* v. *Toy Gun Mfg. Co.* (1912) 172 Ill. App. 330, even where the plaintiff could waive the tort and sue the company in quasi-contract. See *Avery* v. *McClure* (1908) 94 Miss. 172. Where, however, the statutes contain more comprehensive words than the term debts, as where the stockholders are rendered liable for the dues, acts, or liabilities of the corporation, they are generally construed so as to include liability for the corporation's torts. *Rider* v. *Fritchey* (1892) 49 Oh. St. 285; *Henley* v. *Myers* (1907) 76 Kan. 723; *Kelly* v. *Clark* (1898) 21 Mont. 291. The principal case in holding that a person who has a cause of action in tort is not a creditor within the meaning of the statute seems unduly to restrict its remedial purpose, especially in view of the broad definition of a creditor in § 3215 of the Georgia Code.

Conspiracy—Federal Penal Code § 37—Necessity of Alleging Overt Acts.—An indictment for conspiracy alleged, in addition to the actual conspiring, the commission of an overt act, but did not show the relation of such act to the ultimate object of the conspiracy. The indictment was *held* sufficient. *Houston* v. *United States* (C. C. A. 1914) 217 Fed. 852. See Notes, p. 337.

Conspiracy — White Slave Act — Defendant Incapable of Committing Ultimate Crime.—The defendant was indicted for conspiring with a man that he should transport her in interstate commerce for immoral purposes. *Held,* a demurrer to the indictment should be overruled. *United States* v. *Holte* (1915) 35 Sup. Ct. Rep. 271. See Notes, p. 337.

Constitutional Law—Blue Sky Laws—Validity.—A West Virginia statute required all corporations and individuals dealing in stocks and bonds to file a statement of solvency and a description of the investments offered with the state auditor who should forbid the sale of such securities as seem to him unlikely to return a reasonable income. The dealer was also required to make annual financial reports, and if a non-resident, to agree to accept service of process on the state auditor as valid personal service. *Held,* the statute is unconstitutional as depriving individuals of their property without due process of

law, denying them the equal protection of the laws, and imposing a burden on interstate commerce. *Bracey* v. *Darst* (D. C. N. D. W. Va. 1914) 218 Fed. 482. See Notes, p. 350.

CONSTITUTIONAL LAW—FOREIGN CORPORATIONS—RIGHT TO SUE IN STATE COURTS.—A statute provided that no foreign corporation should transact business within the State, or maintain a suit in the state courts without first designating a resident agent and filing a copy of its charter with the Secretary of State. The plaintiff, without complying with the statute, sued to recover the price of an interstate shipment. *Held,* as the statute imposed unreasonable and burdensome restrictions on interstate commerce, it was contrary to the Commerce Clause and consequently unconstitutional. *The Sioux Remedy Co.* v. *Cope* (1914) 35 Sup. Ct. Rep. 57.

For a discussion of the contrary holding by the state court in the same case, and a criticism of that decision, for the reasons set forth by the Supreme Court, see 12 Columbia Law Rev. 271.

CONTEMPT—VIOLATION OF INJUNCTIONS—EXCUSE.—Pursuant to § 63 of the Insurance Law, the court issued an order directing the superintendent of insurance to liquidate the business of a local corporation, and restraining all creditors from suing the corporation or from making any levy upon its assets. After being served with this order, the defendant filed a claim in the United States District Court of Virginia against the fund, deposited by the corporation as a condition of doing business within that State. *Held,* the defendant was guilty of criminal contempt. *People* v. *Richmond Radiator Co.* (N. Y. App. Div., 1st Dept. 1914) 150 N. Y. Supp. 398.

It is elementary that equity will not act directly upon a foreign *res,* but may, if the facts warrant, restrain a person within its jurisdiction from dealing unconscientiously with such property. So in the principal case the court could not direct any disposal of the fund in Virginia; but it might restrain the defendant from attempting to attach any part of it. It seems quite probable that the defendant might have had the order modified with respect to his rights in this fund, *cf. Matter of Binghamton etc. Co.* (1894) 143 N. Y. 261, but this fact does not justify his disobedience thereof. The good faith and belief of the defandant that he was not violating an injunction will not justify his action, though such circumstances mitigate the penalty imposed. *Young* v. *Rothrock* (1903) 121 Ia. 588; see *Roosevelt* v. *Edson* (1885) 7 N. Y. Civ. Pro. 7. Nor is it any excuse that the injunction was too broad or was granted for an insufficient cause. *C. U. Tel. Co.* v. *State* (1886) 110 Ind. 203; *Billard* v. *Erhart* (1886) 35 Kan. 616; see *Kaehler* v. *Dobberpuhl* (1883) 56 Wis. 497. In fact, to avoid the consequences of criminal contempt the defendant must show that the court granting it was entirely without jurisdiction and that the injunction was therefore void. *Ex parte Fisk* (1885) 113 U. S. 713; *Brown* v. *Moore* (1882) 61 Cal. 432; *Lewis* v. *Peck* (C. C. A. 1907) 154 Fed. 273.

CONTRACTS — DEFENSE — PLAINTIFF'S ILLEGAL MONOPOLY UNDER ANTI-TRUST ACT.—The plaintiff offered a percentage of its profits if the defendant would deal exclusively with it during a certain period. All purchases made by the defendant were accompanied by a clause in the contract of purchase to the effect that the goods were sold for

the defendant's own use and were not for resale. The defendant sets up, in defense to a suit for the price of the goods sold, that the plaintiff is an illegal monopoly, and that the contract of sale is void under the Anti-Trust Act. *Held,* the defense is not maintainable. *Wilder Mfg. Co.* v. *Corn Products Refining Co.* (U. S. Sup. Ct. October Term, 1914, No. 71). Not yet reported.

It is a general rule that the terms of an illegal contract will not be enforced. *Hanauer* v. *Doane* (1870) 12 Wall. 342; *McMullen* v. *Hoffman* (1899) 174 U. S. 639. Moreover, such a contract has the effect of rendering void any transaction or contract which is closely connected with it. See 1 Page, Contracts, § 506. It may be set up in defense, therefore, that a certain contract is in violation of an act of Congress, see *Bement* v. *National Harrow Co.* (1902) 186 U. S. 70, or any other law. See *Wheeler* v. *Russell* (1821) 17 Mass. 258, 281. But where the contract can be proved without reference to an illegal arrangement by virtue of which the plaintiff has violated a statute, illegality is no defense. *Cf. Dennehy* v. *McNulta* (C. C. A. 1898) 86 Fed. 825. So the fact that the plaintiff is a monopoly in violation of the Anti-Trust Act does not render its contracts invalid. *Connolly* v. *Union Sewer Pipe Co.* (1902) 184 U. S. 540; *cf. National Distilling Co.* v. *Cream City Importing Co.* (1893) 86 Wis. 352. If, however, the plaintiff seeks to recover for goods which were sold in pursuance of, and as part of an illegal contract, binding on both parties, it is a good defense that the enforcement of the contract will result in giving effect to a violation of the Act inhering in the sale. *Continental Wall Paper Co.* v. *Voight & Sons Co.* (1909) 212 U. S. 227; 9 Columbia Law Rev. 343. In the principal case it was conceded that the sale, despite the conditions, was intrinsically legal, and the court therefore refused to regard either the sale or the conditions illegal merely because the plaintiff was a monopoly and may have been aided as such by the conditions which formed a part of the sale.

Contracts—Statutes—Effect of Invalidity.—Certain provisions with reference to the non-employment of aliens were inserted in a contract in compliance with § 14 of the Labor Law. *Held,* since the statute is unconstitutional, the provisions in the contract become inoperative. *Heim* v. *McCall* (1914) 150 N. Y. Supp. 933.

An unconstitutional statute does not become a part of a contract made after such statute is passed and before it is declared unconstitutional, where the contract does not expressly incorporate the provisions of the statute. *Palmer* v. *Tingle* (1896) 55 Oh. St. 423. Even when the provisions of an unconstitutional statute are expressly incorporated in a contract in obedience to the statute, as in the principal case, they have been uniformly regarded as inoperative, *People* v. *Coler* (1901) 166 N. Y. 1, 21; *Cleveland* v. *Construction Co.* (1902) 67 Oh. St. 197, 220, apparently in violation of the principle that full effect must be given to a writing incorporated in a contract by reference. 2 Page, Contracts, § 1115. It is said that the injected provision is supported solely by the statute, because the parties did not agree to it, and therefore falls if the statute is void. But the fact that the contractor signed the contract proves his assent to the terms imposed by the other party, and his agreement was therefore quite voluntary. See dissent of Parker, C. J., in *People* v. *Coler, supra,* p. 38. Even assuming the correctness of the argument in the majority opinion, it is difficult to see how there can be a contract without a meeting of the minds. What

the court really does is to read into the contract a proviso that these stipulations are to be effective only if the statute is valid. The other suggestion of the court, that the provisions are in derogation of rights protected by the Constitution, even if sound, would also be fatal to the rights of the contractor because although the contractor would not be bound by the illegal provision in such a case, *Insurance Co.* v. *Morse* (1874) 87 U. S. 445, the whole contract would be void, the illegal consideration not being severable. *Bishop* v. *Palmer* (1888) 146 Mass. 469; *Haynes* v. *Rudd* (1886) 102 N. Y. 372. The decision of the court may be justified by a desire to prevent the legislature from enforcing an invalid law.

Corporations—Stockholder's Liability for Corporate Debts.—In an action by the receiver of a corporation in behalf of creditors to enforce the payment of corporate debts from unpaid subscriptions, *held,* the stockholders could not avoid liability on the ground that the whole amount of the capital stock had not been subscribed. *Silvain* v. *Benson* (Wash. 1915) 145 Pac. 175.

In the absence of statute, stockholders are not individually liable to the creditors of the corporation. *Toner* v. *Fulkerson* (1890) 125 Ind. 224. Creditors may, however, under certain conditions, compel a subscriber to contribute the unpaid amount of his subscription to the payment of the corporate debts. If the corporation is solvent and the stockholder's liability on the contract of subscription has matured, it can be reached by a creditor through garnishee process in execution of a judgment recovered against the corporation. See *Simpson* v. *Reynolds* (1880) 71 Mo. 594; *Lane's Appeal* (1884) 105 Pa. 49, 63. This remedy is rather limited, however, since the creditor is in no better position to enforce the claim than the corporation would be; *Exposition R. Co.* v. *Canal St. R. Co.* (1890) 42 La. Ann. 370; *McKelvey* v. *Crockett* (1884) 18 Nev. 238; and since non-subscription to the full capital stock is a defense to an action against the stockholder by the corporation, *Stoneham R. R. Co.* v. *Gould* (Mass. 1854) 2 Gray 277; *Haskell* v. *Worthington* (1887) 94 Mo. 560, it would also be a defense to garnishment proceedings by the creditor. *Exposition R. Co.* v. *Canal St. R. Co., supra.* Where, however, the corporation is insolvent, a more liberal remedy is open to the creditors. The capital stock, including the balance unpaid thereon, is treated as a trust fund for the payment of the corporate debts, and if a bill is filed in equity in behalf of the creditors, the stockholder is not allowed to set up any defenses he might have against the corporation which would lessen the amount of capital held out to persons dealing with the corporation. *Upton* v. *Englehart* (C. C. 1874) 3 Dill. 496; *Hatch* v. *Dana* (1879) 101 U. S. 205; *Hamilton* v. *Railroad Co.* (1891) 144 Pa. 34. These equitable principles have likewise been applied in actions at law by the assignee in bankruptcy of the corporation against the stockholders, *Sanger* v. *Upton* (1875) 91 U. S. 56, and in actions by a receiver in behalf of creditors, *Farnsworth* v. *Robbins* (1887) 36 Minn. 369, so the result reached in the principal case seems correct.

Criminal Law—Burglary—Breaking Out of a Building—New York Penal Law, § 404(2).—The defendant entered a building through an open door, closed it, re-opened it after committing a crime within the building and escaped through the doorway. *Held,* two justices dissenting, this was not burglary under § 404(2) of the Penal Law.

People v. *Toland* (N. Y. App. Div., 3rd Dept. 1915) 151 N. Y. Supp. 482.

Breaking out of a building after committing a crime within is generally not burglary in the absence of express statutory provision. 2 Bishop, New Criminal Law (8th ed.) § 99; *Brown* v. *State* (1876) 55 Ala. 123; *White* v. *State* (1874) 51 Ga. 285; *contra, State* v. *Ward* (1876) 43 Conn. 489. In New York "A person who * * * being in any building commits a crime therein and breaks out of the same is guilty of burglary in the third degree." N. Y. Penal Law, § 404(2). Whether an exit made through a door opened by the defendant is burglarious, according to the prevailing opinion, depends upon the agency by which it was originally closed, but the reasoning advanced in support of this theory is unsatisfactory, and the court appears to have been influenced by the difference between the penalties imposed for burglary and petit larceny. Provided the door was opened by the defendant himself it seems immaterial by whom it was closed. It has long been recognized that opening a closed door is sufficient breaking to render a subsequent entry burglarious; Bishop, Statutory Crimes (3rd ed.) § 312; *State* v. *Wilson* (1793) 1 N. J. L. 439; and the identical act performed for purposes of exit seems equally to be a breaking, *Rex* v. *Callan* (1809) R. & R. 157; *Rex* v. *Lawrence* (1830) 4 C. & P. 231; *Regina* v. *Wheeldon* (1839) 8 C. & P. 747; *cf. Lawson* v. *Commonwealth* (1914) 160 Ky. 180, although under a rather narrow interpretation of § 400, defining the word "break", the result reached in the principal case might be justified. 52 N. Y. L. J. 2046. The test established by the principal case seems artificial, and unfortunate from the viewpoint of public safety. If it were consistently applied the question whether a man is guilty of murder or manslaughter would, under some circumstances, depend upon whether he burst through a closed door in flight or merely pushed it open. See N. Y. Penal Law, § 1044(2); § 404(2); § 407(3); § 2 "Felony"; § 1050(1); § 1299. *People* v. *Meyer* (1900) 162 N. Y. 357.

Descent and Distribution—Taxation—Vested Interests.—An administrator sued to recover back a tax paid under the War Revenue Act of 1898 on a distributive share passing under the intestacy laws. *Held,* as the distributee's interest could not vest in possession and enjoyment before distribution, it was until then contingent, and was recoverable under a statute providing for the refunding of taxes collected on contingent interests not vesting in possession and enjoyment prior to the date of repeal of the tax. *United States* v. *Jones* (1915) 35 Sup. Ct. Rep. 361.

Upon the death of an intestate the legal title and right to possession of his personal property passes to the administrator, *Scruggs* v. *Scruggs* (C. C. 1900) 105 Fed. 28; *Lawrence* v. *Wright* (1839) 40 Mass. 128, who holds the property in trust for the distributee. *Thompson* v. *Thomas* (1855) 30 Miss. 152. At common law the right of the distributee was regarded as an equitable right to compel the administrator ultimately to account for the estate, *Pritchard* v. *Norwood* (1892) 155 Mass. 539, a right which develops into a legal title upon distribution. See *Perryman* v. *Greer* (1863) 39 Ala. 133. Under statute, legal title is frequently said to vest on the death of the intestate, distribution merely serving to ascertain the property to which it attaches. *Moore* v. *Gordon* (1867) 24 Ia. 158. Nowhere, however, is the distributee entitled to possession upon the death of the intestate

as against the administrator. *Jahns* v. *Nolting* (1866) 29 Cal. 508; *Scruggs* v. *Scruggs, supra.* His interest, therefore, like that of a legatee is too unsubstantial and empty to justify taxation before the right to possession accrues. *Matter of Curtis* (1894) 142 N. Y. 222. As the tax in the principal case was imposed on succession, *Knowlton* v. *Moore* (1900) 178 U. S. 41, 56, it could not attach until the successor was entitled to ownership. *Mason* v. *Sargent* (1881) 104 U. S. 689. The courts are unwilling to impose the burden of a tax on a right which is only technically vested. *Vanderbilt* v. *Eidman* (1905) 196 U. S. 480. The distributee must have entered upon the enjoyment of his legacy or share in order that his interest may be truly vested. See *United States* v. *Fidelity Trust Co.* (1911) 222 U. S. 158. The interest of the distributee in the principal case, moreover, was clearly a "contingent interest not vesting in possession," within the language of the refunding clause, and the tax was therefore recoverable by the administrator.

Evidence—Cross-examination of Medical Expert—Admissibility of Medical Books.—Without referring to any specific medical book, a medical expert gave an opinion concerning a certain fact based largely upon his reading and upon the authorities. On cross-examination counsel sought to read from a medical treatise and to ask the witness if he concurred. *Held,* this was not objectionable, as it was aimed to test the doctor's knowledge and the reliability of his data. *State* v. *Brunette* (N. Dak. 1914) 150 N. W. 271.

While medical books may not be read to the jury as evidence of the facts and theories therein expressed, *Union Pac. Ry.* v. *Yates* (C. C. A. 1897) 79 Fed. 584; 10 Columbia Law Rev. 267, if an expert witness bases his opinion on works of standard repute and cites a certain authority to fortify his opinion, such authority may be produced on cross-examination and used for the purpose of contradicting his testimony by showing that it does not support him. *Pinney* v. *Cahill* (1882) 48 Mich. 584; *Eggart* v. *State* (1898) 40 Fla. 527, 538; *Clark* v. *Commonwealth* (1901) 111 Ky. 443. But when the expert makes no reference to any medical authority as the basis of his opinion, the use of texts on cross-examination is generally prohibited, since they serve only to inform the jury that an opinion adverse to that of the witness exists, and their admission would be merely an evasion of the rule excluding them as evidence. *Bloomington* v. *Schrock* (1884) 110 Ill. 219; *Hall* v. *Murdock* (1897) 114 Mich. 233; *Butler* v. *Railroad Co.* (1902) 130 N. C. 15; *contra, Hess* v. *Lowery* (1889) 122 Ind. 225; *Clukey* v. *Seattle Electric Co.* (1901) 27 Wash. 70, 75. It would seem that the same reasons for forbidding such cross-examination should apply where, as in the principal case, the expert bases his opinion upon his reading of the authorities in general, but refers to no specific book, for such examination simply contradicts or qualifies the opinion of the witness by showing what some author has said. *Mitchell* v. *Leech* (1903) 69 S. C. 413.

Insurance—Description of Chattel—Valued Policy.—The defendant insured the plaintiff's pictures as genuine "old masters" at specified values. They were, in fact, chromo copies. *Held,* since the pictures were not the property described in the policy, the plaintiff cannot recover for their loss even if he honestly believed them to be as he represented. *Petow* v. *North British & Mercantile Ins. Co. of London & Edinburgh* (N. J. 1914) 92 Atl. 272.

In the case of a valued insurance policy, over-valuation, however gross, will not work a forfeiture unless it be fraudulent, *Sturm* v. *Atlantic Mut. Ins. Co.* (1875) 63 N. Y. 77; *Patapsco Ins. Co.* v. *Briscoe* (Md. 1835) 7 Gill. & J. 293; *Barker* v. *Janson* (1868) L. R. 3 C. P. 303; Elliott, Insurance, § 333, nor will it be taken as conclusive evidence that the contract was a gambling one. *Coolidge* v. *Gloucester Marine Ins. Co.* (1819) 15 Mass. 341. But in general a material misrepresentation of fact, whether innocent or wilful, will avoid an insurance policy, Richards, Insurance, 128; Elliott, Insurance, § 114, and the misrepresentation as to the genuineness of the pictures in the principal case, though it did not mislead the insurer as to their combustibility, undoubtedly induced the making of the contract insuring them at an excessive valuation. Since a contract induced by innocent misrepresentation may be rescinded, 15 Columbia Law Rev. 187, the decision in the principal case can be supported on the ground that the policy was voidable, though the position taken by the court seems untenable, since it is clear that the chromos were the pictures described, however wrongly described, in the policy.

Judgments—Representation—Persons Not in Esse.—In a partition suit, the living owners instead of making provision for the contingent interests of their unborn children proceeded on the theory of absolute ownership. An action was later brought for specific performance by a person who claimed title through the judgment in the partition proceedings for the sale of the property. *Held,* the plaintiff's title was defective, since living owners may represent the interests of unborn persons in the property, only when all the interests are similar. *Adami* v. *Gercken* (N. Y. 1914) 164 App. Div. 472. See Notes, p. 346.

Libel and Slander—Repetition of Charges of Another.—A newspaper published a statement that certain named persons "claim to have learned" of improper acts on the part of a public official. *Held,* the libel could not be defended on the ground that it was the bare statement of a charge made by another. *Walling* v. *Commercial Advertiser Assn.* (N. Y. 1914) 165 App. Div. 26.

As the result of a dictum in an old English decision, *Earl of Northampton's Case* (1613) 12 Coke *132, the doctrine grew up that a person who in good faith merely announces without indorsement that charges have been made by another whose name is given is not liable for slander. *Tatlow* v. *Jaquett* (Del. 1834) 1 Har. 333; see *Jarnigan* v. *Fleming* (1871) 43 Miss. 710. The dangers of permitting the unrestricted circulation of slanderous statements have led most courts to reject this doctrine, and it is not the general law at the present time. *Branstetter* v. *Dorrought* (1882) 81 Ind. 527; *Fowler* v. *Chichester* (1874) 26 Oh. St. 9; *Davis* v. *Sladden* (1889) 17 Ore. 259. But no court, whether accepting or rejecting this rule as to slander, extends it to libel. *Dole* v. *Lyon* (N. Y. 1813) 10 Johns. *447; *Hagener* v. *Pulitzer Pub. Co.* (1912) 172 Mo. App. 436; *Times Pub. Co.* v. *Carlisle* (C. C. A. 1899) 94 Fed. 762. To justify a written statement that certain defamatory charges have been made by another, it is not sufficient to show that such charges have actually been made, but the truth of the substance of the charges must be established. *Ropke* v. *Brooklyn Daily Eagle* (1887) 9 N. Y. St. Rep. 709; *Meeker* v. *Post Printing etc. Co.* (1913) 55 Colo. 355. Since false charges

of specific offenses against public officers are libelous and not privileged as fair comment, *Hamilton* v. *Eno* (1880) 81 N. Y. 116, a person repeating such charges, even as the assertion of another, would seem, on reason and authority, guilty of libel himself.

Marine Insurance—Acceptance of Abandonment by Insurer.—The owner of a sunken ship gave notice of abandonment, which the insurer refused to accept. The insurer then raised the vessel and tendered her back without repairs, but the owner refused her and sued for a total loss. *Held,* the clause in the policy allowing the insurer to raise and repair without accepting did not protect his act of raising alone, which amounted to an acceptance of the abandonment, regardless of the original right to abandon. *Alliance Ins. Co.* v. *Producers' Cotton Oil Co.* (Miss. 1915) 67 So. 58.

It has long been settled in Massachusetts that the insurer even after abandonment, may repair and promptly return an abandoned ship in order to show that she was not a constructive total loss. *Peele* v. *Suffolk Ins. Co.* (Mass. 1828) 7 Pick. 254; *Commonwealth Ins. Co.* v. *Chase* (Mass. 1838) 20 Pick. 142. In the federal courts, however, any dominion by the insurer subsequent to notice of abandonment was held to be in acceptance thereof. *Peele* v. *Merchants' Ins. Co.* (C. C. 1822) 19 Fed. Cas. 98. To avoid the operation of this rule, a clause was inserted in marine policies authorizing the insurer to recover the ship without thereby accepting the abandonment. But unless the act of the insurer is done in a reasonable time and in accordance with the terms of the clause, it is not authorized thereby and is deemed an act of ownership consistent only with an acceptance of the abandonment. *Norton* v. *Lexington etc. Ins. Co.* (1854) 16 Ill. 235; *Copelin* v. *Insurance Co.* (1869) 9 Wall. 461; *Hume* v. *Frenz* (C. C. A. 1907) 150 Fed. 502. A strict interpretation of the policy in the principal case does not authorize raising without repairing, and therefore the insurer's dominion is properly held to imply acceptance. *Northwestern Transp. Co.* v. *Continental Ins. Co.* (C. C. 1885) 24 Fed. 171; *Copelin* v. *Phoenix Ins. Co.* (1870) 46 Mo. 211. Since the abandonment was accepted, it becomes immaterial whether there was originally such constructive total loss as would give the owner the right to abandon. *Norton* v. *Lexington etc. Ins. Co., supra; Copelin* v. *Insurance Co., supra; Richelieu etc. Nav. Co.* v. *Thames etc. Ins. Co.* (1888) 72 Mich. 571.

Municipal Corporations — Necessity of Filing Claim in Tort — Infancy.—A statute required a person injured by the negligence of a town to file a claim for his injuries within 60 days after the cause of action accrued. The claim of the plaintiff, an infant of five years, whose mother was living, was not filed until 23 months after such injury, when the suit was brought by her mother as guardian *ad litem. Held,* immature infancy is such physical and mental disability as to exempt the infant from the operation of the statute. *Murphy* v. *Village of Fort Edward* (1915) 213 N. Y. 397.

Statutes compelling persons injured by the negligence of a town to file their claims before commencing action, usually do not expressly exempt infants. *Winter* v. *Niagara Falls* (1907) 190 N. Y. 198; *Peoples* v. *Valparaiso* (1912) 178 Ind. 673. Nor is an infant in such cases protected by § 396 of the New York Code of Civil Procedure which releases infants from the operation of the Statute of Limitations,

Winter v. *Niagara Falls, supra*, since it is well settled that statutes like the one under consideration are not merely Statutes of Limitations, so that failure to comply with their requirements constitutes a defense. Such legislation rather makes the filing of a notice a condition precedent to the maintenance of the action, the performance of which must be alleged in the complaint in order that it is valid on demurrer. *Reinung* v. *Buffalo* (1886) 102 N. Y. 308; *Curry* v. *Buffalo* (1892) 135 N. Y. 366; *Susenguth* v. *Rantoul* (1880) 48 Wis. 334. The courts, however, in construing statutes like that in the principal case have held that physical and mental incapacity is a sufficient excuse to release the injured person from compliance with the statute, *Ehrhardt* v. *Seattle* (1903) 33 Wash. 664; *Forsyth* v. *Oswego* (1908) 191 N. Y. 441, and immature infancy might very well be considered as such mental and physical disability to exempt a very young child from the operation of the statute. *Contra, People* v. *Valparaiso, supra.* Although filing of claim by the guardian is filing by the infant, *Taylor* v. *Woburn* (1881) 130 Mass. 494, still, since the statute imposes no direct duty upon the guardian, the decision in the principal case seems desirable in order to protect the interests of the infant.

Negotiable Instruments—Accommodation Maker—Discharge.—In a suit by the payee of a promissory note, a joint maker defended on the ground that, since he had signed merely for accommodation, he was discharged by the payee's release of collateral security without his consent. *Held,* since the payee is not a holder in due course, the note in his hands is as though non-negotiable, under § 58 of the Negotiable Instruments Law, and the defense is therefore available. *Long* v. *Shafer* (Mo. 1914) 171 S. W. 690.

Prior to the enactment of the Negotiable Instruments Law, the maker of a promissory note might show that he signed merely as surety, and in such a case any acts of the creditor which altered the surety's right of recourse against the principal debtor, such as granting an extension of time, or discharging collateral security, would discharge him. *Hubbard* v. *Gurney* (1876) 64 N. Y. 457; *Guild* v. *Butler* (1879) 127 Mass. 386. While the Negotiable Instruments Law does not expressly abrogate this doctrine of the law of suretyship, it has been held to have that effect so far as accommodation makers are concerned, because as makers they come within the definition of persons primarily liable, and in the provisions for the discharge of the instrument the old defenses of a surety are not included. The question has usually arisen in cases where the creditor has extended the principal debtor's time for payment, and the result has generally been the same whether the creditor was a payee, *Vanderford* v. *Farmer's etc. Bank* (1907) 105 Md. 164; *Cellers* v. *Meachem* (1907) 49 Ore. 186, or an indorsee with notice. *Union Trust Co.* v. *McGinty* (1912) 212 Mass. 205; *National Citizens' Bank* v. *Tovlitz* (N. Y. 1903) 81 App. Div. 593; *Richards* v. *Market Exchange Bank* (1910) 81 Oh. St. 348. The distinction adopted in the principal case between a holder in due course and a payee as affected by § 58 has been made in at least one other jurisdiction. *Fullerton Co.* v. *Snouffer* (1908) 139 Ia. 176. The effect of it, however, is to make the defense as available under the Act as it was before, for if it is good against a payee because he is not a holder in due course, it should be equally available against an indorsee with notice.

Negotiable Instruments—Bona Fide Holder—Notice of Infirmity. —In an action by an indorsee of a note as a *bona fide* holder for value, *held,* any circumstances which would have placed a reasonable man on guard in purchasing negotiable paper are sufficient to constitute notice of a defect to the purchaser so as to defeat a recovery by him. *Fidelity Trust Co.* v. *Mays* (Ga. 1914) 83 S. E. 961.

A holder of a note intervened to prevent a deed, given as security, from being set aside as fraudulent. *Held,* actual knowledge of the fraud, or knowledge of such facts that his action in taking the instrument amounted to bad faith, is required to defeat the intervener. *Smathers & Co.* v. *Toxaway Hotel Co.* (N. C. 1914) 83 S. E. 844.

An early English case announced the doctrine that if negotiable paper was purchased under circumstances which would excite the suspicions of a prudent and careful man, the purchaser could not recover. *Gill* v. *Cubitt* (1824) 3 B. & C. 466. This rule, which was contrary to the previous doctrine in England, *Lawson* v. *Weston* (1801) 4 Esp. 56, was soon discarded, and the former test of actual bad faith on the purchaser's part was restored. Under this rule suspicious circumstances, or even gross negligence would not defeat the rights of a purchaser for value. *Backhouse* v. *Harrison* (1834) 5 B. & A. 1098; *Goodman* v. *Harvey* (1836) 4 A. & E. 870. The Georgia case, following the test in *Gill* v. *Cubitt,* finds support in several jurisdictions in America, *Roth* v. *Colvin* (1859) 32 Vt. 125, 135; *Mee* v. *Carlson* (1908) 22 S. Dak. 365; see *Citizens' Bank* v. *Leonhart* (1890) 126 Ind. 206, but the great weight of authority supports the rule as stated in the North Carolina case. *Goodman* v. *Simonds* (1857) 20 How. 343, 366; *Magee* v. *Badger* (1866) 34 N. Y. 247; *Hamilton* v. *Voight* (1870) 34 N. J. L. 187; Negotiable Instruments Law, § 56. This rule fosters a freer circulation of negotiable instruments, furnishes a clearer and simpler question for the jury, and, keeping in mind that the negligence or carelessness of the purchaser may be evidence of his bad faith, see *Canajoharie Nat. Bank* v. *Diefendorf* (1890) 123 N. Y. 191; *Goodman* v. *Harvey, supra,* would seem to be the better test in determining the rights of the holder.

Real Property—Inchoate Right of Dower as Basis of Action to Restrain Waste.—The plaintiff's husband deserted her and conveyed his lands to the defendant. The plaintiff, who had not joined in the deed, brought action to restrain the defendant from drilling oil and gas wells, on the theory that he was committing waste and injuring her dower right. *Held,* the action was not maintainable. *Rumsey* v. *Sullivan* (N. Y. App. Div. 4th Dept. 1914) 150 N. Y. Supp. 287.

While before it is assigned, dower is often spoken of as a mere chose in action, see *Rogers* v. *Potter* (1866) 32 N. J. L. 78, 84, 86, and falls short of an estate in land, nevertheless it constitutes an incumbrance on the property, *Porter* v. *Noyes* (1822) 2 Me. 22; 2 Scribner, Dower (2nd ed.) 6; see note 11 American Decisions, 39, and may be asserted during coverture, if the husband before marriage conveyed his property in fraud of the wife's right. *Petty* v. *Petty* (1843) 43 Ky. 215; *Youngs* v. *Carter* (N. Y. 1877) 10 Hun 194. In so far as it lacks the characteristics of a vested estate, the inchoate right of dower may be compared with the interests of a contingent remainderman or an executory devisee, which are often protected against waste on the part of the owner of the precedent estate. *Turner* v. *Wright* (1860) 2 DeGex. F. & J. *234; *Gordon* v. *Lowther* (1876)

75 N. C. *193; *Brashear* v. *Macey* (1829) 26 Ky. *89; *Kollock* v. *Webb* (1901) 113 Ga. 762. In California similar protection has been extended to the holder of a right of entry. *Pavkovich* v. *Southern Pacific Ry.* (1906) 150 Cal. 39. While in the jurisdiction of the principal case, the legislature may abolish the inchoate right of dower, *Moore* v. *Mayor* (1853) 8 N. Y. 110, this is by no means the universal rule, *In re Alexander* (1894) 53 N. J. Eq. 96, and even in New York the right to destroy it has been limited to action on the part of the State. *Simar* v. *Canaday* (1873) 53 N. Y. 298. In view, therefore, of the substantial nature of the right and its analogy to other future interests in land, it may well be argued that the wife should be protected against third parties under the circumstances of the principal case, even while the right is inchoate, and this result has been reached in at least one jurisdiction. *Brown* v. *Brown* (1912) 94 S. C. 492. It must be admitted, however, that she could not seek such relief against the husband, and it is hard to see how her inchoate right is increased by any alienation of his rights in the property.

Suretyship and Guaranty—Notice of Principal's Default.—In an action on a note conditioned to become void upon the payment of another, *held,* since the makers of the latter note were guarantors of the first, they were entitled to no notice of their principal's default. *Masters* v. *Boyes* (Okla. 1914) 145 Pac. 363.

Cases relieving a guarantor from liability when unnotified of his principal's default have arisen from various misconceptions of the character of the obligation assumed by a guarantor. Some courts have shown a tendency to confuse it with that of an indorser of negotiable paper. *Reynolds* v. *Edney* (N. C. 1861) 8 Jones 406; see *Heyman* v. *Dooley* (1893) 77 Md. 162. Others have thought that the default of the principal lay peculiarly within the knowledge of the guarantee and that consequently notice thereof should be given to the guarantor within a reasonable time. *Globe Bank* v. *Small* (1845) 25 Me. 366; 2 Daniel, Negotiable Instruments (6th ed.) § 1787. The judges seem to have been influenced by the fact that a contract of guaranty is only a secondary and collateral one. They failed to recognize the further fact that a promise of guaranty may be absolute and that then the default of the principal in itself constitutes the condition precedent upon which an absolute liability is to arise. *Hungerford* v. *O'Brien* (1887) 37 Minn. 306. When a man unconditionally guarantees the performance of a definite contract, whether it be for the doing of acts or the payment of money, he in fact promises that the obligations of that contract will be lived up to, and from the very nature of such a promise flows the duty of finding out whether or no they are lived up to. *Hubbard* v. *Haley* (1897) 96 Wis. 578. From the earliest times, therefore, it has been held by the great weight of authority to be unnecessary to give notice to a guarantor of his principal's default. *Brookbank* v. *Taylor* (1624) Cro. Jac. 684 (2); *Barker* v. *Scudder* (1874) 56 Mo. 272; *Home Savings Bank* v. *Shallenberger* (1914) 95 Neb. 593; Spencer, Suretyship, § 184.

Torts—Forcible Entry and Detainer—Perfection of Entry.—The defendant, the owner of premises, entered during the absence of the plaintiff who was holding over after an expired lease, barricaded the entrance and forcibly resisted the plaintiff's attempt to re-enter. *Held,* the defendant's entrance, though not in itself forcible, must

be viewed in connection with his subsequent acts in forcibly maintaining the possession so gained, and so regarded, these acts constituted forcible entry. *Hammond Savings & Trust Co.* v. *Boney* (Ind. 1915) 107 N. E. 480. See Notes, p. 348.

TRUSTS—INVESTMENT OF FUNDS—PROFITS OF TRUSTEE.—A testamentary trustee invested part of the trust funds in notes sold by a firm of which he was a member. The notes had been obtained by the firm from third parties at a small profit. *Held,* the trustee must pay over such profits to the beneficiaries. *Magruder* v. *Drury* (1914) 35 Sup. Ct. Rep. 77.

The general rule both in England and in this country is that a trustee may not deal with the trust property so as to benefit himself financially, *Aberdeen Town Council* v. *Aberdeen University* (1877) L. R. 2 App. Cas. 544; *Jacobus* v. *Munn* (1883) 37 N. J. Eq. 48; *Linsley* v. *Strang* (1910) 149 Ia. 690, and it is no defense to prove that the interests of the beneficiary are in no wise injured or that the trustee is innocent of fraud. *White* v. *Sherman* (1897) 168 Ill. 589; see *Munson* v. *Syracuse etc. R. R.* (1886) 103 N. Y. 58, 74. In a few instances, however, courts have relaxed this rule; as, for example, where the trustee by reason of his position is elected president of some company in which the trust estate controls a large share of stock, or collects a fee from some third party or because of his help in the advantageous sale of the property receives a share of the broker's commission. *Lafferty's Estate* (1893) 2 Pa. Dist. 215; *Young* v. *Barker* (N. Y. 1910) 141 App. Div. 801; *Hecksher* v. *Blanton* (Va. 1910) 66 S. E. 859. While in all these cases the trustee's profit was either only very remotely the result of his administration of the trust or amounted to a gratuity, see *Whitney* v. *Smith* (1869) L. R. 4 Ch. App. 513; *Aetna Ins. Co.* v. *Church* (1871) 21 Oh. St. 492, it must be admitted that they tend to blur the sharp outlines of a well established rule of law founded on sound public policy, that all profits in the management of trust property be paid to the beneficiary, see *Smelting Co.* v. *Reed* (1897) 23 Colo. 523, and for this reason the principal case seems correct in refusing to allow any departure from the rule.

WATERS AND WATER COURSES—EASEMENTS—EQUITABLE ESTOPPEL.—An owner of land allowed a club to construct a dam, and by written agreement gave the club exclusive fishing rights in a slough thus created, also reserving a fishing right to himself in the water on his land. A subsequent owner thereupon made extensive improvements for fishing. *Held,* reciprocal rights arose and the club was liable in damages for having subsequently cut the dam and drawing off the water. *Thomas* v. *Fin & Feather Club* (Tex. 1914) 171 S. W. 698.

It is elementary that an owner of a prescriptive right may omit to use it entirely. *Brace* v. *Yale* (1868) 99 Mass. 488. If, however, an artificial condition of flowing water be maintained throughout the prescriptive period, the owner of the servient tenement if he has made improvements on the faith of the new condition, acquires an equitable right to have such artificial condition maintained as though it were a natural one, *Mathewson* v. *Hoffman* (1889) 77 Mich. 420; *Kray* v. *Muggli* (1901) 84 Minn. 90; *Smith* v. *Youmans* (1897) 96 Wis. 103; Jones, Easements, § 808, and all subsequent grantees of the dominant or servient tenement are respectively subjected to and protected by the easement on the theory that they are in privity with the original

parties. At common law the cases in which a negative easement could be acquired were extremely few, and it was never recognized as possible of acquisition in water courses, and thus, if the doctrine of "reciprocal rights" rests upon any theory of the acquisition of a negative easement in the artificial condition, it must of necessity fall. *Cf. Mason* v. *Shrewsbury etc. Co.* (1871) L. R. 6 Q. B. 578. The only theory upon which the cases can be supported is that the owner of the dominant tenement cannot be suffered to restore the flowing water to its natural condition if the owner of the servient tenement has on the faith of and in reliance upon the artifical condition made extensive improvements to meet the change of condition, see *Woodbury* v. *Short* (1845) 17 Vt. 387; *Ford* v. *Whitlock* (1855) 27 Vt. 265, and then, of course, it should become immaterial whether or not the owner of the dominant tenement has in fact acquired a prescriptive right. The principal case applies this reasoning to an action at law, and reaches its conclusion on the further ground that, since the agreement ran with the land, the grantee of the original owner should be allowed damages for its breach.

WATERS AND WATERCOURSES—MUTUAL IRRIGATION COMPANIES—WATER RIGHTS APPURTENANT TO LAND.—The certificates of a mutual ditch company provided that the holder should be entitled to a specific volume of water for each share held, so long as he should use the water on the land described on the back of the certificate. *Held,* the water rights represented by the certificate were appurtenant to the land described therein. *Berg* v. *Yakima Valley Canal Co.* (Wash. 1915) 145 Pac. 619.

Shares of stock in a mutual ditch company represent both ownership in the ditch and a right to the use of a definite quantity of water. 3 Kinney, Irrigation & Water Rights (2nd ed.) § 1485. Water rights represented by shares of stock in one of these mutual corporations are transferrable by two methods. The shares in such a company are regarded as personal property, *Tregear* v. *Etiwanda Water Co.* (1888) 76 Cal. 537; *Watson* v. *Molden* (1905) 10 Ida. 571, and an assignment thereof or a transfer on the books of the corporation, is considered sufficient to pass title to the water rights, see *Snyder* v. *Murdock* (1899) 20 Utah 419; *Cache La Poudre Irrigation Co.* v. *Reservoir Co.* (1898) 25 Colo. 144, which the new owner may apply on any land and for any purpose that he may choose. *George* v. *Robison* (1901) 23 Utah 79. On the other hand, while it is recognized that the stock itself may not be regarded as appurtenant to the land upon which the water is beneficially used, *Wells* v. *Price* (1899) 6 Ida. 490; *Oppenlander* v. *Left Hand Ditch Co.* (1892) 18 Colo. 142, the weight of authority supports the principal case in maintaining that the water rights may, upon conveyance of the stockholder's land, pass to the purchaser as an appurtenance thereto. *Graham* v. *Pasadena Land & Water Co.* (1908) 152 Cal. 596; *Brockman* v. *Grand Canal Co.* (1904) 8 Ariz. 451. Whether or not, in a particular case, the water rights are easements appurtenant, is always a question of fact, depending on the intent of the parties as expressed in the deed or implied from surrounding circumstances. See *Ruhnke* v. *Aubert* (1911) 58 Ore. 6; *Spurgeon* v. *Santa Ana etc. Co.* (1898) 120 Cal. 71.

WILLS—EXEMPT PROPERTY—APPROPRIATION.—After a general direction to pay debts, a testator bequeathed the residue of his estate to his

wife. *Held*, the payment of debts was not charged upon the proceeds of insurance policies which by law were exempt. *German-American Bank* v. *Godman* (Wash. 1915) 145 Pac. 221.

Since the exemption of property from the payment of debts is entirely a creature of statute, see *Fink* v. *Fraenkel* (1891) 14 N. Y. Supp. 140, the decisions on the subject must be interpreted in the light of the controlling statutes. Where property is expressly exempted for the benefit of the debtor's family, his right to waive such exemption has been denied. *Burke* v. *Finley* (1893) 50 Kan. 424. It has been said that the underlying principle of all exemption laws is the benefit and support of the debtor's family; see *Wright* v. *Pratt* (1872) 31 Wis. 99, 104; *Wilcox* v. *Hawley* (1864) 31 N. Y. 648, 657; and yet many courts have held it to be a personal privilege which the debtor may claim or waive at his pleasure. *Hewes* v. *Parkman* (1838) 37 Mass. 90; *Spitley* v. *Frost* (C. C. 1883) 15 Fed. 299, 304. Even recognizing the right of the debtor to waive exemption in his lifetime, it hardly seems that his widow and family, for whose benefit the exemption continues after his death, *Becker* v. *Becker* (N. Y. 1866) 47 Barb. 497, should be deprived of the benefit of the law by allowing him, in his will, to appropriate the exempt property to the payment of his debts. Nevertheless, it seems to be recognized that he can do so. *Union Trust Co.* v. *Cox* (1902) 108 Tenn. 316; *Schnabel* v. *Schnabel's Exrx.* (1900) 108 Ky. 536. According to the general rule, the intention of a testator to charge his real estate as the primary fund for the payment of his debts must be unequivocally expressed, and will not be presumed from a mere general direction to pay debts. *Matter of City of Rochester* (1888) 110 N. Y. 159; *Cooch's Exr.* v. *Cooch's Admr.* (Del. 1879) 5 Houst. 540, 567; *Harmon* v. *Smith* (C. C. 1889) 38 Fed. 482. It seems the courts should be just as slow to ascribe to the testator an intention to charge his debts on his exempt property and thus deprive his family of the benefits of the exemption. *Larson* v. *Curran* (1913) 121 Minn. 104; *Cross* v. *Benson* (1904) 68 Kan. 495; *contra, Union Trust Co.* v. *Cox, supra.*

Witnesses—Competency—Transactions with Decedent.—The plaintiff was rendered incompetent to testify to personal transactions with the defendant's grantor by reason of the latter's death. A transcript of the plaintiff's testimony concerning such transaction, given at a former trial while the grantor was alive and present, was offered in evidence. *Held*, the transcript was admissible. *New* v. *Smith* (Kan. 1915) 145 Pac. 880.

In general, former testimony or a deposition competent when given, are admissible on a subsequent trial, although the witness has since become disqualified by reason of insanity, *Marler* v. *State* (1880) 67 Ala. 55, or of interest, *Sabine* v. *Strong* (1843) 47 Mass. 270, or by statute. *Wells* v. *Insurance Co.* (1898) 187 Pa. 166; but see *Goldstein* v. *State* (Tex. 1914) 171 S. W. 709. Where, however, a survivor is rendered incompetent by statute to testify to transactions with a deceased party, see N. Y. Code Civ. Proc. § 829, a majority of the courts have excluded his testimony or deposition, though given during the lifetime of the deceased, on the ground that the witness testifies at the time when the testimony is read at the trial, and not when such testimony was given. *Zane* v. *Fink* (1881) 18 W. Va. 693, 747; *Greenlee* v. *Mosnat* (1907) 136 Ia. 639; *Boyd* v. *Gore* (1910) 143 Wis. 531. These courts deny the analogy of such cases to those where the wit-

ness is rendered incompetent by insanity or interest, and hold that since the object of the disqualification is to preserve absolute equality between the parties, to admit such testimony would contravene the spirit of the statute. The ground of disqualification under consideration is the only survival of the common law rule that interest rendered a witness incompetent, and has been severely criticized as being of doubtful expediency. 1 Wigmore, Evidence, § 578. Since the deceased has full opportunity to cross-examine the witness, and since admission of the testimony throws important light upon the transaction, the view taken by the court in the principal case that the testimony is admissible, and that the test of competency is to be applied at the time it is given, seems preferable. *Armitage* v. *Snowden* (1874) 41 Md. 119; *Pratt* v. *Patterson* (1876) 81 Pa. 114; *Rice* v. *Motley* N. Y. (1881) 24 Hun 143.

Witnesses—Privilege Against Self-Crimination—Waiver.—A person had voluntarily appeared and testified before a committing magistrate as to a crime alleged to have been committed by himself and other parties. At a subsequent trial of one of the parties, he asserted his privilege of refusing to testify. *Held,* the waiver of privilege at the preliminary hearing did not waive it for other trials. *People* v. *Cassidy* (1915) 213 N. Y. 388. See Notes p. 340.

BOOK REVIEWS.

EUGENE UNTERMYER, *Editor-in-Charge.*

HANDBOOK OF THE LAW OF MUNICIPAL CORPORATIONS. By ROGER M. COOLEY, LL.M. St. Paul: WEST PUBLISHING CO. 1914. pp. xii, 711.

There is perhaps no field of our entire law that is more "spotted" than that which we designate as the "law of municipal corporations." In spite of the monumental treatises that have been written upon this subject, there is a distressing amount of vagueness and inconsistency in many of the doctrines and principles that have been evolved. Prof. Cooley has set himself a difficult task. He has essayed "to give a clear and concise treatment of those fundamental principles which must be and are applied in any attempt to formulate or construe the law of municipal corporations as found in the various statutes." In a brief handbook dealing with so vast and complicated a subject there is obviously little opportunity for a critical and comparative analysis of these fundamental principles. To the extent that these principles are themselves in more or less logical contradiction conflicts and ambiguities of declaration must be expected. In plain point of fact this extent is by no means inconsiderable. However, even though due allowance be made for the necessities of brief treatment, several criticisms of this work may be recorded.

Thus the author has somewhat overstressed the statutory sources of the law of municipal corporations. He has not indicated with sufficient force that an already large and ever increasing proportion of the law upon this subject originates in the construction and application of constitutional provisions. It is almost astounding, for example, to find that the constitutional scheme of allowing cities to frame their own charters, for which provision is now made in one-fourth of our state constitutions, is discussed in a single brief paragraph (pp. 44, 45); that it is treated under a chapter entitled "Creation of Municipal Corporations," although the power in question is in no state (with the possible exception of Oregon) conferred upon communities but only upon corporations already created; that the numerous difficult questions of law to which this scheme has given rise are dismissed with one or two assertions that are so broad as to be fairly meaningless, and with the citation of two Minnesota cases (p. 45); and that the subject is not mentioned at all in the chapter dealing with "Legislative Control" (Ch. III). Indeed this whole subject of legislative control, under which it would have been appropriate, in so far as is possible, to array the entire set of principles which govern the legal relations existing between municipal corporations and the states of which they are a part, is not satisfactorily handled. It is, for example, apparently the view of the author that the doctrine of an inherent right of local self-government in municipalities is the prevailing doctrine in most American jurisdictions (p. 72). Of the four cases cited in support of this doctrine, that of the Nebraska jurisdiction has been completely overruled, while the Michigan case is of doubtful pertinency and the New York case of no pertinency at all. Only the Indiana case is specifically in point. A single case might have been cited from each of the Kentucky (113 Ky. 540), Iowa (116 Ia. 96) and Texas (45 Tex. Crim. App. 1, repudiated in 97 Tex. 1, 12) jurisdictions; but Professor Cooley ought to have said

that "this principle has been denied in a few jurisdictions" only because it has not been urged in many jurisdictions. The entire history of legislative practices toward municipal corporations in the United States stands as a complete refutation of this doctrine of law, which has at most received expression and application in a very few cases and in less than half a dozen states.

Professor Cooley's specific applications of this doctrine are likewise open to criticism. He is by no means justified in declaring that it is "well recognized that . . . officers exercising purely municipal or local functions should be free from legislative control" (p. 73). Many of the cases cited in the notes to the section in which this declaration is made are cases which arose over the application of specific constitutional provisions. It is high time that the cases in this branch of the law which are hung upon constitutional provisions should be completely separated from these which are rested upon "general principles."

Again it may be remarked that the declaration to the effect that "it is equally well settled by repeated decisions that it rests with the inhabitants of a municipality to determine conclusively whether a debt shall be incurred for purely municipal purposes" is open to serious question. The citation of the state of Pennsylvania as being "the only exception" to the "wholesome doctrine" of the "celebrated Detroit park case" is, it would seem, wholly without warrant. The fact is that municipal corporations have seldom made the contention before the courts that they were protected against legislative domination by any such principle of law as this. The rule, therefore, has been discussed in very few cases. But the fact is, also, that there is scarcely a city of age or importance in the country that has not at one time or another been under statutory mandate to incur debts for purely municipal purposes, and in many cities at the present time no small part of the annual expenditures is made under legislative compulsion. Nor are the requirements of the legislature in this regard restricted to matters of state-wide as distinguished from local concern. If there exists in the body of our law any such principle as this it is certainly astonishing that, in spite of almost limitless opportunity for its application, it has in fact been invoked in an almost negligible number of cases.

Again it may be observed, although it must be admitted that the opinions expressed by the courts upon the subject are in a state of sublime disarray, that Professor Cooley's discussion of the protection against the legislature which the municipal corporation enjoys in its property, is more nebulous than the circumstances seem to require (pp. 88-92). He does not even indicate in this connection that the source of the corporation's right in this respect is to be found almost wholly in the general guarantee of due process of law.

It is not intended by what is here set down to imply that the author of this work has been careless and inaccurate. In many of his questionable statements of principle he has followed the writings of other and more exhaustive commentators and the views which have been put forward by certain courts as if they were generally accepted principles. The truth of the matter is that the law of municipal corporations is in a woful state of confusion. There is great need that the cases upon the subject should be discriminatingly and somewhat ruthlessly reviewed; that pages upon pages of dicta as well perhaps as certain ill-considered cases of renown, should be wholly discredited

as authorities; and that inconsistencies of doctrine as announced in the several branches of the subject (such, for example, as the inconsistencies in the application of the highly variable distinction between the municipal corporation in its public, governmental, or agency capacity and in its local or private capacity) should be set out in bold relief. Moreover this study of cases should be made in the light of an adequate and accurate knowledge both of the history and of the existing facts concerning constitutional provisions, legislative practices, and municipal charters. This history and these facts are revealed but dimly in the recorded decisions of the courts. In spite of Dillon, McQuillin, and other briefer commentators, there remains important work of a pioneer character in this field of law. Until such work shall have been done a satisfactory brief text upon this subject is very nearly an impossibility.

In those parts of his subject—and these are numerous—in which the law is in a state of comparative clearness, Professor Cooley's work is in every respect admirable. Moreover, it is well organized and discloses an unusual regard for proportion. In spite of the criticisms to which it is open, it will unquestionably serve with merit the needs not only of students but also of practitioners.

Howard Lee McBain.

MAGEE ON BANKS AND BANKING. A TREATISE ON THE LAW OF NATIONAL AND STATE BANKS INCLUDING THE CLEARING HOUSE AND TRUST COMPANIES. By H. W. MAGEE, B.L. Albany: MATTHEW BENDER & Co. 1913. pp. lvii, 1039.

This portly volume constitutes the second edition of "Magee on Banks and Banking," the first edition of which appeared in 1906. The panic of 1907 gave rise to so many new legislative regulations in the field of banking, and, in consequence, to so many new cases before the courts, that, in the interests of accuracy, a revision of the first edition became necessary.

As Mr. Magee points out in his preface, the main advance has been the settlement of "the question of the right of a State through its Legislature to deprive a citizen of the right of free banking, through restrictive legislation." "It is now settled," says the author, "that the business of banking, unless conducted as authorized by the legislative authority of the State, is forbidden to an individual." The Supreme Court of the United States has not as yet passed directly upon this question, but Mr. Magee points out that in the case of Assaria State Bank *v.* Dolley (1911), 219 U. S. 121, the Court held "that the Legislature of the State may impose incorporation as a police regulation and as a privilege of safety."

In view of the fact that the first edition of Mr. Magee's book has been so favorably known for a half-dozen years, and in view of the further fact that the changes made in the edition under review have not involved material changes in the structure of the volume, a detailed setting forth of the contents would constitute a work of supererogation. Suffice it to say that Chapters I to VIII inclusive deal in the main with questions of organization; Chapters IX to XII inclusive with the law of bank officers; Chapters XIII to XVIII inclusive with bank powers, the amendment of charters, etc.; Chapters XIX to XXXVIII inclusive with the banks' business activities; while Chapters XXXIX to XLVIII inclusive deal with such questions as liens, forfeitures, insolvency and dissolution. Separate chapters in

the last-named series are devoted respectively to savings banks, to clearing houses, to trust companies and finally to the subject of inspection and examination of banks. At the beginning of each chapter Mr. Magee summarizes succinctly the established principles of law relating to the topics therein discussed, reviewing subsequently the main cases in which such principles were established. Generous quotations are given from the more important decisions, while summaries with adequate references are given when the points involved are not of outstanding significance. In the appendix Mr. Magee reprints the National Bank Act and acts amendatory thereof, as well as parts of U. S. Treasury Department Circular Number 52, which supplies valuable information concerning the bonded indebtedness and the monetary system of the United States. It would have added to the value of Mr. Magee's references to the money system had he indicated clearly the source of his information in this respect. Lastly, reference must be made to the index without which, of course, no book of the kind under review would be a workable tool.

Eugene E. Agger.

Since the first appearance of this edition, Congress has passed the Federal Reserve Act. The publishers have provided for an interpretation of this enactment a supplementary pamphlet, containing the Statute, in which the author of the main work discusses the provisions and powers of the new law as well as he is able without the assistance of judicial construction.—Ed.

A Treatise on the Law of Public Utilities Operating in Cities and Towns. By Oscar L. Pond, A.M., L.L.B., Ph.D. Indianapolis: The Bobbs-Merrill Co. 1913. pp. liv, 954.

The author tells us in the introductory chapter of this work that, while our municipalities are growing very rapidly, the complexity and difficulty of problems connected with municipal public utilities are increasing still more rapidly. This growth, he asserts, led first to the recognition "of a repressive police power whose exercise was found necessary and not inconsistent with constitutional private rights." The exercise of this power not proving entirely adequate to the situation, however, there has developed, he says, "a demand for the municipal ownership and operation of what have come to be known as municipal public utilities, or their adequate regulation or control." "This treatise on the law of municipal public utilities," therefore, "attempts to ascertain both the nature of the municipal corporation as expressed in the law and in the construction which the courts have given to the powers conferred upon the municipality by the State, to discover what limitations are placed on municipal activity by our constitutions, as construed by the courts; and how far the judicial construction of the law with regard to the taxation and sale of municipal public utilities facilitates or impedes the cities in the discharge of these new duties imposed by the ownership, operation or proper regulation and control of municipal public utilities, which they are being called upon to assume; and also to ascertain what are the most efficient methods of regulation and control available to the State or municipality over the operation by private capital of municipal public utilities."

The book first deals with the powers of municipal corporations, classifying such powers as governmental on the one hand, and as

proprietary or commercial on the other, pointing out how the latter are derived expressly or by implication from the municipal charters, showing what sorts of activities these proprietary powers include, and how their exercise may be limited by constitutional limitations of municipal indebtedness. Then the author considers questions having to do with the grant of franchises to private companies, discussing the purposes for which such franchises may be granted, the right to grant exclusive and perpetual franchises, the conditions which may be attached by contract to such grants, and the duty to serve all impartially, which flows from the receipt of such franchises. After this discussion follow chapters dealing with the liability of water-works companies for fire loss, the liability of municipalities for negligence, municipal public utilities as additional servitudes in streets, exemption from taxation of property supplying municipal public utilities, the right to sell property providing such utilities, and the rights of parties on the expiration or forfeiture of franchises. The author devotes half a dozen chapters to rates and their regulation, including the question of valuation of capital, and closes his text with chapters on municipal ownership, municipal bureaus or commissions, and state public utility commissions. In addition to the text there are three appendixes containing the Public Service Commission Law of New York, the Public Utilities Law of Wisconsin, and the Public Utilities Law of Indiana. There are, of course, the usual table of contents, table of cases and index.

The author has adopted an unusual method of presenting his subject-matter, but the reviewer is neither able to commend the effectiveness of this method in the present instance, nor to recommend it for imitation by other authors of law texts. The method adopted is this: Each chapter opens with ten or a dozen sections setting forth argumentatively certain propositions connected with the subject announced in the chapter heading, but without any citation of authorities. These sections are followed by a footnote, generally covering about two pages, containing anywhere from twenty-five to seventy-five cases, classified by jurisdictions, but not in any way classified as to subject-matter. Probably three-fourths of the reading matter in each chapter follows this collection of authorities, and consists almost entirely of long quotations from a selected number of the cases previously cited, which are intended to support the propositions set forth in the earlier part of the chapter. It is apparent that the book is not, as a text book should be, a systematic development of the theory of the law, based at each step upon a critical and analytical study of authorities, but is rather a protracted lawyer's brief, with something of the modern digest feature thrown in. It is submitted that the subject-matter of Mr. Pond's book might have been presented in half the space devoted to it, and with twice its present effectiveness and usefulness, if the ordinary method of text book writing had been adopted.

The critical reader of this work will undoubtedly be disappointed by the loose and sometimes superficial way in which Mr. Pond presents his subject, while he will frequently find that the style of the text makes it difficult for him to follow the author's line of thought. The book is overloaded with long, involved and unwieldy sentences, not infrequently covering half a page. Take for instance this paragraph (§ 231):

"With references to the nature of the duty of public service corporations so well enunciated in the case of Munn *v.* People of Illinois,

94 U. S. 113, 24 L. ed. 77, the fact that the service is rendered to the public subjects it to public regulation and control in the interest of the public and for the benefit of any member thereof which may be especially affected or directly interested. This principle, therefore, is fully applicable to corporations providing municipal public utility services, and the case of Pond *v.* New Rochelle Water Co., 183 N. Y. 330, 76 N. E. 211, 1 L. R. A. (U. S.) 961, decided in 1906, furnishes an important decision in this connection, for it applies this principle to the matter of providing water service for the purpose of determining the rights of the individual inhabitants, who are or desire to become customers of such service, to secure the same by an action in their own name in accordance with this principle which is best stated in the early case, that has long since become a leading one, of Lawrence *v.* Fox, 20 N. Y. 268."

The reader will notice that his own confusion in this paragraph seems to have been shared by the author, with the result of the bad grammar in the phrase "their own name", near the end of the paragraph. In fact we find a rather frequent confusion of plurals and singulars throughout the book, as for instance, in the last sentence of Section 30, in Section 32, in the last sentence of Section 37, in the last sentence of Section 232, and in the third sentence of Section 350.

There is, however, useful material in Mr. Pond's book, and it is interesting to have the law of public utilities presented with special reference to the rights and powers of the municipality. In fact, any book on public utilities which presents new material, or a new point of view, cannot help being useful and interesting to the legal profession, for comparatively little has, as yet, been written in this field, but it is to be regretted that Mr. Pond did not do a more careful, thorough and analytical piece of work, when he had so free a field before him.

Charles K. Burdick.

THE INDIVIDUAL DELINQUENT. A TEXT-BOOK OF DIAGNOSIS AND PROGNOSIS BY ALL CONCERNED IN UNDERSTANDING OFFENDERS. By WILLIAM HEALY, A.B., M.D. Boston: LITTLE BROWN & COMPANY. 1915. pp. xxv, 830.

The doctor is to be congratulated upon having performed a useful and arduous task. His book is based on the study of a thousand cases undertaken in connection with his work in the Juvenile Court in Chicago, and conducted with unusual ability according to the most modern methods.

In the introduction he states that his object was the search for any "driving forces" to crime and "the ascertainment of the methods and the facts which will help towards the making of practical diagnoses and prognoses," and that his main conclusion is "that every case will always need study by itself. We have come to see that neither we nor other investigators can make such a contribution to the principles of our science as shall ever do away with the necessity for (a) careful personal study of each offender, and (b) testing the value of measures carried out, always by the criteria of future results."

Incidentally he has disposed, finally I trust, of the statement that crime is a disease, that there is a criminal type marked by either physical or psychological stigmata, and that there is, or can be, a

moral imbecile, so-called. He finds that the fact, as ascertained, overwhelmed the theories.

"It was clearly evident that classification by crimes leads only in special instances to knowledge of the criminal; that statistics of seasons, and races, and head-measurements, and alcoholism, and so on, mean almost nothing for the fundamental understanding of the individual case; that epileptic and atavistic theories could not be substantiated by case histories; that refinements of psycho-physical measurements sometimes used on criminals need a tremendous amount of overhauling before they can be regarded as valid for conclusions; that the elders, who spoke so glibly of the criminal as a born type, had not the means of investigating whether he was not rather a born defective, and a criminal through accident of environment."

Book 1 is devoted to general data, including an explanation of the methods of study adopted by the author, both medical and psychological, a clear description of the office equipment and the working methods, and statistics. These last are particularly valuable.

He finds, for instance, that leaving out all cases with appearance of doubt, 67-4/10% of the offenders should be regarded without question as mentally normal and only 10% were feeble-minded.

In the table of statistics almost every factor that could possibly have a bearing upon delinquents is considered separately, and from them a general conclusion is to be drawn that we cannot say that any one particular thing is the cause of crime. This conclusion is borne out in Book 2, which is devoted to a study of causes, types and causative factors, and includes everything from heredity to lack of knowledge of arithmetic and the excessive use of tea and coffee. Probably the most useful result of Dr. Healy's work is to show the futility of any attempt to classify or consider criminals different from the rest of mankind and the uselessness of further study along these lines. It is interesting to see that his researches bring out the opinions held by most judges of our criminal courts, namely, that criminals are not essentially different from the rest of mankind, that they are not the victims of a social system and that they should not be treated as medical cases.

In Case #49 he gives the views of an expert professional criminal who so far has carried on his profession with impunity and is to my mind, and I think to the author's himself, the whole matter in a nutshell. He says: "The only way to stop us is to find out who and what we are and what we are good for. Then you have got to make punishment severe enough or opportunities good enough for us. You don't do either of these now. Either you've got to make it so hard for me that I would rather work at laborer's wages than take a chance or else you've got to give me a decent job."

On the whole the book is to be strongly commended to persons interested in criminology and in prison reform. If read attentively it will tend to reduce the number of ill advised experiments in the latter direction.

J. E. Corrigan.

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CONGRESSIONAL PROHIBITIONS OF INTERSTATE COMMERCE.

Each succeeding session of Congress witnesses an increasing number of proposals to subject to federal regulation matters which in this country have heretofore been dealt with exclusively by the States. The proponents of these measures are evidently prompted to turn to the federal government for the accomplishment of their purpose by a desire for uniformity of regulation throughout the country and despair of attaining that uniformity by the coöperation of the States, or by greater faith in the efficiency of federal administration. Impotency or inefficiency of state regulation or the confusion and injustice resulting from conflicting state authority cannot add to the powers delegated to Congress by the federal constitution but they constitute pursuasive arguments in favor of resorting to any delegated power which can be made to accomplish directly or indirectly the purpose sought.

By far the greater number of the pending proposals for extending federal control depend for their constitutionality on the commerce clause and the taxing power. Legislators have been quick to see the possibilities of recent Supreme Court decisions permitting the use of these great powers to rival or to supplement the police power of the States. An Act of Congress levying a prohibitory tax on yellow oleomargarine—obviously not intended to produce revenue but to destroy the article taxed—having been upheld by the Supreme Court,[1] Congress levied similar prohibitive taxes on poisonous phosphorous matches[2] and on certain contracts for the

[1]Act of August 2, 1886, 24 Stat. 209. McCray *v.* United States (1904) 195 U. S. 27, 24 Sup. Ct. 769.

[2]Act of April 9, 1912, 37 Stat. 81.

future sale of cotton.[3] Congress has also levied a nominal tax on opium dealers and, under the pretence of providing for its collection, regulated the business of buying and selling opium.[4] By such tax laws Congress is enabled indirectly to regulate matters which it could not constitutionally regulate directly.

In like manner Congress, though without power to prohibit the conduct of lotteries in a State, indirectly but effectively destroyed the lottery business by forbidding the shipment in interstate commerce of lottery tickets or literature. The lottery act having been upheld by the Supreme Court,[5] Congress has since enacted other laws, some of which have likewise been held constitutional, prohibiting interstate commerce in specified persons or things, not in the interest of commerce itself, but in the interest of the public welfare.

When the Supreme Court established the right of Congress to use the taxing power for regulation as well as for revenue, and the commerce power as well for promoting the public welfare as for the protection and advancement of interstate commerce, it opened the gateways to indefinite expansion of federal regulation. What may Congress not do under the power to tax out of existence, to regulate under the guise of taxation, or to withdraw the facilities of interstate commerce from specified persons or things?

The indirect use of the commerce power is the more important and interesting because it is most often resorted to and because it involves more unsettled questions. The Supreme Court might have ruled that regulation of interstate commerce could not take the form of prohibition of such commerce. It might have ruled that Congress could regulate or prohibit interstate commerce only in the interest of protecting or benefiting that commerce or its instrumentalities and not for the purpose of protecting the public health, safety, morals or welfare. But the Supreme Court has not so limited the power; on the contrary it has upheld congressional prohibitions of interstate commerce enacted for the protection of public morals or for the advancement of the public welfare. Opponents of federal regulation have been obliged, therefore, to find some other bar to the further extension of the federal power through indirect use of the commerce clause. They urge that Congress cannot regulate manufacturing, that Congress cannot trespass on the reserved powers of the States and that Congress,

[3]Act of August 18, 1914, 38 Stat. 693.
[4]Act of December 17, 1914, 38 Stat. 785.
[5]Lottery Case (1903) 188 U. S. 321, 23 Sup. Ct. 321.

though it may look forward and protect the consumer of articles transported through interstate commerce, may not look backward and protect the producer of articles to be transported in interstate commerce. These attempts to limit the field of regulation opened to Congress under the commerce clause by the decision in the lottery and white slave cases,[6] raise fundamental questions as to the nature and extent of the Congressional power over commerce.

In considering what limitations, if any, the federal constitution places on the power of Congress over interstate commerce, we shall avoid confusion if we keep constantly in mind the difference between the question whether in a given instance Congress is acting under the power delegated to it under the commerce clause, and that related but separate question whether, admitting that Congress is acting within its powers, its action may be objected to by the individual on the ground that it deprives him of that due process guaranteed to him by the Fifth Amendment. These are distinct questions. The one involves the respective jurisdictions of the federal and state governments to be determined under the commerce clause and the reserve powers clause. The other has nothing to do with the relation of the nation and the States but arises only after we have determined that a regulation is clearly within the federal power, and it involves only the right of the individual under the Fifth Amendment to resist federal action which operates to deprive him of life, liberty or property without due process.

That the power to "regulate" interstate commerce includes power to "prohibit" such commerce may be demonstrated by general principles of interpretation and by precedent. Under the Articles of Confederation each State had complete control of its commerce with other States and could of course prohibit such commerce. The exercise of this power resulted in embarrassing and destructive consequences and led to an oppressed and degraded state of commerce.[7] The prevailing motive for the adoption of the present Constitution, said Daniel Webster in his argument in the case of *Gibbons* v. *Ogden*,[8] was "to rescue it [commerce] from the * * * perpetual jarring and hostility of commercial regulation. * * * The entire purpose for which the delegates assembled at Annapolis, was to devise means for the uniform regulation of trade. They found no means, but in a general government; and they recommended a convention to accomplish

[6]Hoke *v.* United States (1913) 227 U. S. 308, 33 Sup. Ct. 281.
[7]Brown *v.* Maryland (1827) 12 Wheat. 419, 446.
[8](1824) 9 Wheat. 1, 11, 12, 13.

that purpose. * * * We do not find, in the history of the formation and adoption of the Constitution, that any man speaks of a general *concurrent power,* in the regulation of foreign and domestic trade, as still residing in the States. The very object intended, more than any other, was to take away such power. If it had not so provided, the Constitution would not have been worth accepting."

The power of Congress over interstate commerce is exclusive; there is no residuum of power over this commerce remaining in the States.[9] In delegating to the federal government the exclusive power to regulate interstate commerce, the States unquestionably divested themselves of their previous power to prohibit such commerce. If the power to "prohibit" interstate commerce was not included in the grant to Congress of power to "regulate" such commerce, what has become of that power? It has been argued that when the individual States surrendered their power to prohibit commerce that power thereupon ceased to exist in either the federal or state governments. But this theory, which has nothing whatever to support it, is negatived by Section 9 of Article I of the Constitution which provides: "The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by Congress prior to the year 1808." Prohibition by Congress of the "migration" of such persons could be based only on the power to regulate interstate commerce; and if the framers of the Constitution did not intend the power to regulate to include power to prohibit, this express restriction on the power to prohibit such migration or commerce was entirely superfluous. It must be assumed that the framers of the Constitution believed that there was necessity for this provision; and that they so believed indicates that they intended the power to regulate interstate commerce granted in an

[9]This power "is complete in itself, may be exercised to its utmost extent and acknowledges no limitations other than are prescribed in the constitution". Gibbons *v.* Ogden (1824) 9 Wheat. 1, 196; Lottery Case (1902) 188 U. S. 321, 353, 23 Sup. Ct. 321, 325-326. "The full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate or intrastate operations." Minnesota Rate Cases (1913) 230 U. S. 352, 399, 33 Sup. Ct. 729, 739. "The power is direct; there is no word of limitation in it, and its broad and universal scope has been so often declared as to make repetition unnecessary". Hoke *v.* United States (1913) 227 U. S. 308, 320, 33 Sup. Ct. 281, 283. "Is there, then, any escape from the conclusion that subject only to such restrictions (those contained in the constitution) the power of Congress over interstate and international commerce is as full and complete as is the power of any State over its domestic commerce?" Northern Securities Case (1904) 193 U. S. 197, 342, 24 Sup. Ct. 436, 459.

earlier section of the Constitution to include power to prohibit the migration of these persons.[10]

The Supreme Court has frequently declared that the power of Congress over interstate commerce is as extensive as its power over foreign commerce.[11] In *Bowman* v. *Chicago and Northwestern Ry.*[12] the court said: "The power conferred upon Congress to regulate commerce among the States is indeed contained in the same clause of the Constitution which confers upon it power to regulate commerce with foreign nations. The grant is conceived in the same terms and the two powers are undoubtedly of the same class and character and equally extensive." Again, in *Crutcher* v. *Kentucky*[13] the court said: "It has frequently been laid down by this court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce."

The regulation of foreign commerce has frequently assumed the form of prohibition. Not only the early embargo and non-intercourse acts[14] but more recent prohibitions of foreign commerce in specified articles have been upheld by the Supreme Court. Among these are the prohibition of importation of inferior grades of tea,[15] of deep sea sponges taken by divers[16] and of foreign convict-made articles.[17] In *Weber* v. *Freed*[18] the court in upholding the prohibition of importation of prize fight films, said that Congress possesses a complete power over foreign commerce and that "its authority to prohibit the introduction of foreign articles" is "recognized and enforced by many decisions of this court". Therefore, if the power to regulate foreign commerce may be exercised to the extent of absolute prohibition, and if the power over interstate commerce is "equally extensive" and "as absolute as it

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[10]The importance of this provision as proving the existence of the power to which it is an exception, was remarked by Chief Justice Marshall in Gibbons *v.* Ogden (1824) 9 Wheat. 1, 216.

[11]Gibbons *v.* Ogden (1824) 9 Wheat. 1, 194, 228; License Cases (1847) 5 How. 504, 578; Brown *v.* Houston (1885) 114 U. S. 622, 630, 5 Sup. Ct. 1091, 1097; Pittsburg & Southern Coal Co. *v.* Bates (1895) 156 U. S. 577, 587, 15 Sup. Ct. 415, 419; Lottery Case (1903) 188 U. S. 321, 351, 23 Sup. Ct. 321, 325.

[12](1888) 125 U. S. 465, 482, 8 Sup. Ct. 689.

[13](1891) 141 U. S. 47, 57, 11 Sup. Ct. 851, 854.

[14]Gibbons *v.* Ogden (1824) 9 Wheat. 1, 192; United States v. Marigold (1850) 9 How. 560, 566; United States *v.* Williams (1808) 18 Fed. Cas. 614.

[15]Buttfield *v.* Stranahan (1904) 192 U. S. 470, 24 Sup. Ct. 349.

[16]The Abby Dodge (1912) 223 U. S. 166, 32 Sup. Ct. 310.

[17]Oceanic Navigation Co. *v.* Stranahan (1909) 214 U. S. 320, 29 Sup. Ct. 671.

[18](1915) 239 U. S. 325, 36 Sup. Ct. 131.

is over foreign commerce" it must necessarily follow that it too may be exercised to the extent of prohibition. This is not to assert that in dealing with interstate commerce Congress possesses the same unrestricted and arbitrary power of prohibition which it may exercise over foreign commerce. The reason for the difference, however, is found not in the commerce clause but in the due process clause of the Fifth Amendment to the Constitution which restrains Congress from arbitrarily depriving the individual of his right to seek an interstate market, but which, because of the general power of Congress over foreign relations has not been applied to guarantee a similar right to seek a market in foreign commerce.

The conclusion that the power to regulate includes the power to prohibit interstate commerce does not, however, depend on general principles of interpretation. It is supported by a number of Supreme Court decisions sustaining prohibitions of transportation or shipment in interstate commerce of specified persons or things. The Supreme Court has upheld Congressional prohibitions of transportation of lottery tickets or advertising matter relating to lotteries,[19] of obscene literature and articles designed for immoral and indecent use,[20] of adulterated or misbranded food or drugs,[21] of transportation of women from one State to another for immoral purposes[22] and of transportation of commodities in which the carrier thereof has a legal interest.[23] It has also upheld the equivalent of prohibition of the transportation of intoxicating liquors in interstate commerce. The Wilson Act[24] declared that on arrival within a State intoxicating liquors shipped from another State become subject to the State's police regulations and are not to be re-

[19]Act of Congress of 1895, 28 Stat. 963, Ch. 191, held constitutional in Champion *v.* Ames (Lottery Case) (1903) 188 U. S. 321, 23 Sup. Ct. 321.

[20]Act of Congress of February 8, 1897, 29 Stat. 512, Ch. 172, and Act of March 4, 1909, 37 Stat. Sec. 249, held constitutional in United States *v.* Popper (D. C., N. D. Cal. 1899) 98 Fed. 423, and cited with approval in Hoke *v.* United States (1913) 227 U. S. 308, 33 Sup. Ct. 281.

[21]Act of June 30, 1906, 34 Stat. 768, Ch. 3915, interpreted and its penalties enforced by the Supreme Court in Hipolite Egg Co. *v.* United States (1911) 220 U. S. 45, 31 Sup. Ct. 364 and United States *v.* Lexington Mill & Elevator Co. (1914) 232 U. S. 399, 34 Sup. Ct. 337. In Seven Cases *v.* United States (1916) 239 U. S. 510, 36 Sup. Ct. 190, the Supreme Court held constitutional an amendment to this Act penalizing false statements as to the curative value or effects of an article.

[22]Act of Congress of June 25, 1910, 36 Stat. 825, Ch. 395, held constitutional in Hoke *v.* United States (1913) 227 U. S. 308, 33 Sup. Ct. 281.

[23]Act of Congress of June 29, 1906, 34 Stat. 584, Ch. 3591, held constitutional in United States *v.* Delaware & Hudson R. R. (1909) 213 U. S. 366, 29 Sup. Ct. 527.

[24]26 Stat. 313, Ch. 728, held constitutional in *In re* Rahrer (1891) 140 U. S. 545, 11 Sup. Ct. 865.

garded as exempt therefrom under the rules protecting original packages shipped in interstate commerce. The power of Congress thus to subject a legitimate article of commerce to state laws which practically prohibit its transportation into a State implies power in Congress to prohibit such transportation. In the Webb-Kenyon Act[25] Congress has prohibited the shipment into a State of intoxicating liquor intended to be used in such State contrary to its laws. This Act has not yet been declared constitutional by the Supreme Court, but that Court has interpreted and applied it without questioning its constitutionality.[26]

Another interesting example of the exercise by Congress of its power to prohibit interstate commerce is the so-called Lacey Act[27] which prohibits interstate shipment of animals or birds killed in violation of state game laws. Like the Webb-Kenyon Liquor Law the Lacey Act represents a use of Federal power to aid the States in enforcing their police regulations. It penalizes shipping out of the State while the Webb-Kenyon Act penalizes shipping into the State. This Act has been held constitutional in the federal and state courts.[28]

Other examples of prohibitions of interstate shipments are: The meat inspection Act[29] which prohibits the shipment of uninspected meat; the cattle quarantine Acts[30] which prohibit shipment of uncertified cattle; the nursery stock Act[31] which prohibits shipment of unmarked nursery stock; and the Act[32] which prohibits shipment of specified virus, serum and toxin for treatment of animals.

So far as the commerce clause is concerned it may, therefore, be regarded as established that a regulation of interstate commerce may take the form of an absolute prohibition of shipment or transportation in such commerce. If the precedents went no further than to uphold the probihition of interstate commerce their value as a

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[25]37 Stat. 699, Ch. 90.

[26]Adams Express Co. *v.* Kentucky (1914) 238 U. S. 190, 35 Sup. Ct. 824.

[27]Sec. 242 of the Criminal Code of the United States.

[28]Rupert *v.* United States (C. C. A. 8th, 1910) 181 Fed. 87; Eager *v.* Jonesboro etc. Express Co. (1912) 103 Ark. 288, 147 S. W. 60, 63. This Act was referred to by the Supreme Court in Silz *v.* Hesterberg (1908) 211 U. S. 31, 44, 29 Sup. Ct. 10, 14, and was construed in United States *v.* Smith (D. C., M. D. Pa. 1902) 115 Fed. 423 and United States *v.* Thompson (D. C., D. N. Dak. 1906) 147 Fed. 637.

[29]June 30, 1906, 34 Stat. 674.

[30]February 2, 1903, 32 Stat. 791; March 3, 1905, 33 Stat. 1264.

[31]August 20, 1912, 37 Stat. 315.

[32]March 4, 1913, 37 Stat. 828.

basis for extending federal control would be unimportant if it were also held that the power to regulate interstate commerce could be exercised only for the protection, advancement or development of such commerce. The importance of the commerce clause as a source of extended federal control lies in the decisions that this power of regulation may be exercised not only for the advancement and the good of interstate commerce, but also as an instrument for promoting the public health, morals, safety or welfare.

It has frequently been stated in the opinions of the Supreme Court that Congress possesses police power under the commerce clause. The discussion of this question, which unfortunately too often proves confusing rather than helpful, is unnecessary for the purpose of this paper. The important fact is that the commerce power may be used not only to protect, benefit or advance commerce itself or its instrumentalities but also to advance the general welfare by indirection through commercial regulation. In the early case of *United States* v. *Williams*[33] Judge Davis in sustaining the constitutionality of the then recent embargo act, said:[34]

"The power to regulate commerce is not to be confined to the adoption of measures exclusively beneficial to commerce itself or tending to its advancement; but in our national system as in all modern sovereignties it is also to be considered as an instrument for other purposes of general policy and interest".

That the power of Congress over interstate as well as foreign commerce may be used as "an instrument for the purposes of general policy" is evidenced by recent decisions of the Supreme Court. In holding constitutional a prohibition of interstate transportation of lottery tickets, the Court[35] said:

"If a State, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another. (p. 356) * * * We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce. (p. 357) * * * If the carrying of lottery tickets

[33](1808) 18 Fed. Cas. 614.

[34]At p. 621.

[35]In Champion *v.* Ames (1903) 188 U. S. 321, 23 Sup. Ct. 321.

from one State to another be interstate commerce, and if Congress is of opinion that an effective regulation for the suppression of lotteries, carried on through such commerce, is to make it a criminal offense to cause lottery tickets to be carried from one State to another, we know of no authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce * * * which has grown into disrepute and has become offensive to the entire people of the nation." (p. 358)

Lottery tickets as articles of commerce were harmless in themselves and there was nothing immoral about their transportation from one State to another. The harm which they did consisted in the detriment to public morals arising from lottery gambling, and what Congress did by its prohibition of their transportation was to withdraw the instrumentalities of commerce over which it had control from the proprietors of lotteries who were seeking an interstate market. There is no denying the fact that the purpose of the prohibition was to stamp out lotteries, and the opinion shows clearly that the court recognized this purpose and upheld it. Congress had no power directly to prohibit lottery gambling, but under the power to regulate interstate commerce it was authorized to deny to the lottery business the privilege of using the facilities of interstate commerce. The importance of this decision can hardly be over-estimated. Until it is qualified or reversed it opens the door and points the way to extended federal regulation. Later cases disclose no tendency toward qualification or restriction of the principles announced in this case. On the contrary, those principles seem now to be firmly established.[36] The Supreme Court in upholding the constitutionality of the white slave traffic Act[37] said:

"The powers reserved to the States and those conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral. * * * Surely if the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women."

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[36]In McDermott *v.* Wisconsin (1912) 228 U. S. 115, 33 Sup. Ct. 431, the court said that Congress "has full power to keep the channels of commerce free from the transportation of illicit or harmful articles, to make such as are injurious to the public health outlaws of such commerce and to bar them from the facilities and privileges thereof."

[37]Hoke *v.* United States (1913) 227 U. S. 308, 322, 33 Sup. Ct. 281, 284.

These cases establish the constitutional power of Congress to prohibit interstate commerce in the interest of promoting the public health, safety, morals or welfare. Congress may forbid interstate commerce in specified persons or things in order to prevent the facilities of such commerce being used to maintain or to further conditions detrimental to the welfare of the country.[38]

What are the limitations, if any, on this power? It has been suggested that there is a distinction between those prohibitions of interstate commerce which operate to forbid transportation of articles or persons to the point where their harmful or objectionable effects are produced, and those prohibitions which exclude from commerce articles to which the only objection is the circumstances under which they were produced. It is alleged that while Congress may prohibit shipment in the interest of protecting the consumer at the end of a journey, it cannot prohibit commerce in the interest of protecting the producer prior to the commencement of a journey in interstate commerce. In the latter case it is said that the damage done by the goods, if any, has been completed before they are offered for carriage in interstate commerce and their transportation into another State cannot increase their damaging effects. The distinction is commonly referred to as the difference between protection of the consumer and protection of the producer. There is nothing in the opinions of the Supreme Court upon which to base such a distinction. Congress in enacting the Lacey Act, prohibited the interstate transportation of perfectly good articles of commerce in the interest of protecting not the consumers of such articles, but persons who have nothing whatever to do with such articles, namely, the hunters or general public of the State of origin. The court has upheld regulations of interstate commerce enacted solely for the protection of the public morals and welfare, and has thereby given effect to indirect regulation where direct regulation would be clearly unconstitutional. It is not the welfare of the consumer which justifies the regulation but the welfare of the public, and as will be pointed out in the discussion of the effect of the due process clause on the exercise of the commerce power, the public welfare is as much dependent upon the welfare of the producer as upon the welfare of the consumer.

Finally, in an effort to stay the tide of federal regulation, its opponents contend that those prohibitions of interstate commerce

[38]See also Seven Cases *v.* United States (1916) 239 U. S. 310, 36 Sup. Ct. 190, holding constitutional the Sherley Amendment to the Food and Drugs Act.

which have for their purpose the advancement of the public welfare rather than any benefit to commerce or its instrumentalities, cannot be carried to the point of interfering with the powers reserved to the States by Art. 10 of the Amendment to the federal constitution which provides: "Powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people." This provision, however, does not apply to a delegated power and only prevents an extension of the powers of Congress to a subject which is not fairly within the scope of those granted by the Constitution. Therefore, Art. 10 does not help to solve the question at issue, which is the extent of the power delegated to Congress under the commerce clause, and especially whether the indirect effects of a regulation of commerce shall be considered in determining the validity of that regulation. As a result of the decision in the Knight case,[39] where it was held that Congress could not directly regulate manufacturing on the ground that the products of the factory would enter into interstate commerce, there has grown up in the profession, and even more among laymen, the idea that Congress cannot interfere with manufacture or production. In the Knight case the court drew a line separating the process of manufacture or production from the process of sale and transportation and held that manufacturing was not commerce and could not, therefore, be regulated directly. The authority of the Knight case has been limited by the Addyston Pipe Line[40] and other recent decisions, and even under the most liberal construction it did not hold that Congress, in the exercise of its undoubted power to regulate interstate commerce, cannot affect the conditions under which manufacturing is carried on.

The Knight case must not be given the effect of a declaration in the federal constitution that Congress shall never affect the conditions under which manufacture is carried on in the States. Such a declaration would have qualified every express grant of power to the federal government and it would then have been true that no regulation of commerce could affect manufacture. This case simply emphasized the distinction between manufacture and commerce but it has led to some confusion and there has grown up not only in the lay mind but in the minds of many lawyers and judges the notion that whatever else it can do Congress can never

[39]United States *v.* E. C. Knight Co. (1895) 156 U. S. 1, 15 Sup. Ct. 249.

[40]Addyston Pipe & Steel Co. *v.* United States (1899) 175 U. S. 211, 20 Sup. Ct. 96.

affect manufacturing. The fact is Congress may reach and affect conditions of manufacture and other acts which take place prior to transportation, and has done so, in the course of its regulation of commerce.

The consequence of several laws passed under the commerce clause has been to affect indirectly the process of manufacture. The meat inspection Act forbids shipment of uninspected meats and authorizes inspectors to enter packing establishments. The constitutionality of this Act has never been questioned. Section 9 of the pure food and drugs Act relieves from prosecution a dealer who can establish a guarantee from the manufacturer that the article shipped was not adulterated or misbranded, and in that case makes the guarantor amenable to prosecution. The court has held this provision of the Act constitutional[41] thereby upholding the power of Congress to reach and affect indirectly conditions of manufacture and sale where the primary purpose is a regulation of interstate commerce.[42] In the Hoke case it is said:[43] "It may be that Congress could not prohibit the manufacture of the article in a State. It may be that Congress could not prohibit in all of its conditions its sale within a State; but Congress may prohibit its transportation between the States and by that means defeat the motive and evils of its manufacture."

In both the Lottery and the Hoke cases it was argued that Congress was invading the field of powers reserved to the States. The court in the latter case effectually disposed of this contention by declaring:[44] "The power of Congress under the commerce clause of the constitution is the ultimate determining question. If the statute be a valid exercise of that power how it may affect persons or States is not material to be considered. It is the supreme law of the land and persons and States are subject to it." To the same effect Mr. Justice Hughes in his recent address before the New

[41]In United States *v.* Heinle Specialty Co. (D. C., E. D. Pa. 1910) 175 Fed. 299 a manufacturer was prosecuted for violation of the Act and it appeared that the dealer to whom he sold adulterated food with a guarantee had shipped it in interstate commerce. The defendant contended that his connection with the food was limited to manufacture and sale within the State and that the law was unconstitutional in so far as it affected his wholly intrastate transactions.

[42]The proposed child labor bill which is typical of pending proposals for extension of federal regulation does not attempt directly to regulate either the manufacture within a State or intrastate sales but simply attempts to prevent the products of a factory employing children from being shipped in interstate commerce.

[43]227 U. S. at p. 322.

[44]At p. 320.

York State Bar Association said: "Thus it is recognized that within its sphere as defined by the Constitution the nation is supreme. The question is simply of the extent of the federal power as granted; where there is authorized exercise of that power there is no reserved power to nullify it—a principle obviously essential to the maintenance of national integrity, yet continually calling for new applications. Thus regulations required in the exercise of the judgment committed to Congress for the protection of interstate commerce cannot be made nugatory by the mere commingling of interstate and intrastate transactions." Not only the authority of the Knight case, but the emphasis which it placed on the idea that manufacturing was set apart and free from the possibility of federal regulation, has been gradually overcome. While Congress cannot directly affect conditions of manufacture or of sale just as it cannot directly regulate intrastate railroad rates, it may, nevertheless, in the exercise of its power over interstate commerce, incidentally affect manufacture and sale or intrastate rates.[45] President Goodnow says:[46] "Men's minds are peculiarly twisted when they argue under a Constitution containing such a provision (the commerce clause) that a regulation purporting to be a regulation of interstate commerce is not such because it will necessarily have the incidental effect of regulating conditions of manufacture. The only reason why it will have this incidental effect is because in the economic conditions of the present day manufacturing has ceased to be a state and has become an interstate matter."

The foregoing portion of this paper has been limited to a discussion of the extent of the power granted to Congress by the commerce clause. We have seen that the power to regulate includes the power to prohibit interstate commerce in specified articles or persons, that this power to regulate or to prohibit may be exercised not only to protect or advance interstate commerce or its instrumentalities, but also indirectly to promote the public health,

[45]In the Minnesota Rate Cases (1913, 230 U. S. 352, 398) it is said: "The authority of Congress extends to every part of interstate commerce and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the nation may deal with the internal concerns of the State as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter."

[46]Social Reform and the Constitution, p. 91.

safety, morals or welfare, and that though Congress cannot directly regulate such intrastate matters as manufacture and production, it may, without trespassing on the reserved powers of the States, regulate or prohibit interstate commerce in such manner as to affect incidentally conditions of manufacture or production. In all of this discussion, we have been searching for the line which separates the federal jurisdiction over commerce from the state jurisdiction. In the determination of this question, we are concerned only with the commerce clause and its interpretation. No other provision of the Constitution throws any substantial light on the problem. What is that commerce over which power was vested in the federal government and in what manner or for what purpose may this power be exercised? The result of the decisions is that the power is exclusive and may be exercised to its furthest limits notwithstanding the incidental effect on matters reserved to the States.

There is, however, in addition to that political control to which Chief Justice Marshall referred as the sole resort of the people when great powers are used unwisely[47] additional limitation upon the exercise by Congress of its power over interstate commerce. This is contained in the Fifth Amendment's guarantee to the individual that his life, liberty and property may not be denied without due process of law. The effect of this limitation has been reserved for separate consideration because it involves not the respective jurisdictions of nation and State over commerce, but the totally different question as to the extent of the individual's right to say to the federal government,—you cannot exercise even the powers expressly delegated to you in such manner as to deprive me of my property or liberty without due process of law. The former raises the issue between nation and State under the commerce clause, the latter raises the issue between the nation and the individual under the commerce clause and the Fifth Amendment. The Fifth Amendment neither limits the federal power in the interest of state power over commerce nor gives to the State any right to object to the extent or the manner of the exercise by the federal government of its delegated powers.

It may be assumed that an arbitrary prohibition of interstate commerce would violate the due process requirement of the Fifth Amendment in that it would unreasonably interfere with the individual's right to seek an interstate market for the sale of his property. There are few cases involving the meaning of

[47]Gibbons *v.* Ogden (1824) 9 Wheat. 1.

the Fifth Amendment's due process clause, but the Supreme Court has said that this clause should have the same construction as the similar clause in the Fourteenth Amendment.[48] In other words "due process" in the Fifth Amendment limits the powers of the federal government in precisely the same way that "due process" in the Fourteenth Amendment limits the powers of the States, except that the court has said that this clause does not affect the federal taxing power.[49] It is now well settled that a state statute containing a reasonable regulation of personal or property right does not constitute a deprivation thereof without due process and is, therefore, constitutional. Constitutionality depends on the reasonableness of the regulation in its effect on personal or property rights.[50]

In *Chicago, B. & Q. R. R.* v. *McGuire*[51] the court said: "Liberty implies absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."

A police regulation will not be held to be unreasonable and therefore unconstitutional unless it is arbitrary and oppressive interference with personal or property rights without that justification which arises from existing conditions detrimental to the public health, safety, morals or welfare, to the betterment of which it bears some substantial relation. If this be the test which determines the constitutionality of an exercise of the State's police

[48]Slaughter House Cases (1872) 16 Wall. 26, 80; Tonawanda *v.* Lion (1901) 181 U. S. 389, 391-392, 21 Sup. Ct. 609, 610; Twining *v.* New Jersey (1908) 211 U. S. 78, 101, 29 Sup. Ct. 14, 20.

[49]Brushaber *v.* Union Pacific R. R. (1916) 240 U. S. 1, 24, 36 Sup. Ct. 236, 244.

[50]"Due process of law within the meaning of the (Fourteenth) amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government." Giozza *v.* Tiernan (1893) 148 U. S. 657, 662, 13 Sup. Ct. 721, 724. The words "due process of law," "were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." Bank *v.* Okley (1819) 4 Wheat. 235, 244; Twining *v.* New Jersey (1908) 211 U. S. 78, 101, 29 Sup. Ct. 14, 20.

"The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen." Dent *v.* West Virginia (1889) 129 U. S. 114, 124, 9 Sup. Ct. 231, 234. See also to the same effect Yick Wo *v.* Hopkins (1886) 118 U. S. 356, 367, 6 Sup. Ct. 1064, 1069; Leeper *v.* Texas (1891) 139 U. S. 462 and 468, 11 Sup. Ct. 577, 579; Yesler *v.* Commissioners (1892) 146 U. S. 644, 655, 13 Sup. Ct. 190, 193-194; Duncan *v.* Missouri (1894) 152 U. S. 377, 382, 14 Sup. Ct. 570, 571-572.

[51](1911) 219 U. S. 549, 567, 31 Sup. Ct. 259, 262; McLean *v.* Arkansas (1909) 211 U. S. 539, 29 Sup. Ct. 206; Jacobson *v.* Massachusetts (1905) 197 U. S. 11, 31, 25 Sup. Ct. 358, 363.

power to legislate for the common good, notwithstanding the guarantee of due process contained in the Fourteenth Amendment, we may confidently assert that a test not less favorable to its constitutionality will be applied to a Congressional exercise of the commerce power in the interest of the common good notwithstanding the due procees clause of the Fifth Amendment. In other words, the test to be applied to determine what is due process under the Fifth Amendment is no more strict than that applied to the determination of the same question when it arises under the Fourteenth Amendment. The police power of the State is a general inherent power of the sovereign government without expression in the state Constitution. The power of Congress to regulate interstate commerce in the interest of the public welfare, if a police power at all, is part of the express power delegated by the Constitution to Congress. In the determination of the effect of the due process clause on the exercise of this power to legislate for the public good, it is not to be expected that the courts will confine the power of Congress, which is express within more narrow litmits than the power of the States, which is general and implied.

In *Adair* v. *United States*[52] the Supreme Court held unconstitutional an act of Congress prohibiting certain corporations engaged in interstate commerce from discriminating against members of trade unions in the employment or discharge of men. The basis of this decision was that the Act constituted a deprivation of the liberty of contract without due process of law. The court discussed in great detail the limitations upon Congressional control over interstate commerce imposed by the Fifth Amendment and concluded that the regulation in this Act violated the due process clause. That this conclusion is justified and proper is declared by the same court in *Coppage* v. *Kansas*[53] where a similar statute of the State of Kansas was held to be a deprivation of the liberty to contract without due process of law. It is significant that in this case the court said:[54] "The decision in the *Adair Case* is in accord with the almost unbroken current of authorities in the state courts. . . . It is not too much to say that such laws have by common consent been treated as unconstitutional."[55] Thus the court indicates that deci-

[52](1907) 208 U. S. 161, 28 Sup. Ct. 277.

[53](1914) 236 U. S. 1, 35 Sup. Ct. 240.

[54]236 U. S. at p. 21, 35 Sup. Ct. at p. 246.

[55]For decisions of state courts holding similar statutes not within the scope of state police power see note in 52 Lawyers United States Supreme Court Report 436.

sions as to the reasonableness of a regulation under the Fourteenth Amendment will at least have a bearing on the question of reasonableness when presented by a federal regulation challenged under the Fifth Amendment.

Admitting the force of the precedents in support of Congressional prohibitions of interstate commerce the opponents of some of the pending proposals for such prohibitions point out that in every previous instance the prohibition of transportation has had for its purpose the protection of the consumer rather than the producer; in other words has sought to protect the community to which the objectionable person or article might be carried in interstate commerce rather than the community from which such article or person might be carried. The fact that much of our previous legislation under the commerce clause has been confined to regulations in the interest of protecting the consumer is merely accidental. The prohibition of shipment of game killed contrary to state laws is an interesting exception. Indeed, the principal purpose of the Mann White Slave Act was to protect persons in the community from which an interstate journey began against that enslavement which might result from the interstate transportation. Reasonableness of such regulations depends on the benefit conferred not on individuals but on the general public. Prohibition of transportation of lottery tickets was upheld by the Supreme Court not on the ground of the benefit done to the individuals who might have been injured by the purchase of such tickets, but rather on the ground that the public welfare was protected to the extent that those individuals were protected against the temptation to lottery gambling. Such regulations would not be held reasonable and therefore permissible despite the due process clause, merely because a large number of individuals were thereby protected from some harmful consquence if it were not also true that the harm to them involved consequent detriment to the public welfare. It is the public welfare, not the welfare of the consumer or the producer which justifies the legislation. The real justification for such legislation as that upheld in the lottery and white slave cases is the establishment by Congress of standards of public health, morals or welfare and the maintenance of those standards by prohibiting interstate commerce which contributes to their violation.

Therefore, Congress in the exercise of the power to regulate interstate commerce may either regulate or prohibit that commerce not arbitrarily or unreasonably, but nevertheless freely

and effectively when conditions detrimental to the public welfare reasonably call for some regulation. The Congressional action in such case will be set aside as unconstitutional only when clearly unreasonable and arbitrary. As the Supreme Court has said with reference to the exercise of the state's police power:[56]

"The mere fact that a court may differ from the legislature in its views of public policy or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference unless the act in question is unmistakably and palpably in excess of legislative power."

The effect of the Fifth Amendment on the congressional commerce power is simply to authorize the individual to assert his constitutional guarantee of due process, to restrain the enforcement of regulations of interstate commerce which are wholly arbitrary and unreasonable. It does not affect the validity of reasonable regulations substantially related to the betterment of evil conditions existing in the nation. It is impossible to lay down in advance any fixed rules which will enable us in all future cases to separate the reasonable from the unreasonable regulation. Every regulation must stand or fall on its relation to the common welfare under all the circumstances existing at the time of its enactment. To him who asks for the application of this general argument to hypothetical cases, as for example whether Congress could prohibit the passage of sound wheat from Minnesota to Wisconsin, we can only reply in the words of Mr. Justice Harlan in the Lottery Case:

"It will be time enough to consider the constitutionality of such legislation when we must do so."

Its constitutionality will depend upon its reasonableness and its reasonableness will depend on the existence or non-existence of conditions which justify this interference by Congress with the individual's right to find for his product a market in interstate commerce.

If it be feared that the recognition of this power in the federal government will result in dwarfing the importance of the individual States it must be remembered that much of the growth in size and cost of the state governments in recent years has been due to an attempt to accomplish in a haphazard way what the

[56]Chicago, B. & Q. R. R. *v.* McGuire (1911) 219 U. S. 549, 569, 31 Sup. Ct. 259, 263.

federal government may be able to accomplish thoroughly and with considerably less expenditure of effort and money.

Moreover, it is not to be assumed that the congressman elected every two years from small districts within the States will conspire to devise ways and means of extending the federal power and crippling the influence of the States. Given its fullest scope and effect there is no real danger in holding that Congress has the power, so far as the States are concerned, to prohibit commerce among the States. That prohibition must, under the Fifth Amendment, bear some reasonable relation to the public welfare. It must not be arbitrary, confiscatory or unreasonable. This limitation in the interest of protecting the individual's rights is sufficient constitutional guarantee against any dangerous use of the power.

It would be hard to improve on Mr. Justice Marshall's statement in *Gibbons* v. *Ogden*.[57]

"If as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several States is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their identity with the people and the influence which their constituents possess at elections are in this as in many other instances, as that for example of declaring war, the sole restraints on which they have relied to secure them from its abuse."

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[57] 9 Wheat. at p. 197.

MAY NATIONAL BANKS ACT AS TRUST COMPANIES?

Whether or not the Federal Reserve Board may lawfully confer upon national banks power to act as executors, administrators and trustees and as registrars of stocks and bonds, may appear to be a question of little importance except to the parties financially interested; but the question is one that involves the relations between the States and the Federal government and the decision of it one way or the other may accelerate or retard the present tendency toward the extension of the scope of the Federal power.

Trust companies have protested against the invasion of their peculiar field by national banks designated by the Federal Reserve Board, and the favored national banks, finding themselves subjected in the business of commercial banking to the competition of the trust companies, are inclined to maintain the privileges accorded to them by the Federal Reserve Board. Applications have been made to the Attorneys General in several States to inquire into the power of the banks to act under the authority of the Reserve Board. Suits have been brought, and in Illinois a decision has been rendered by the Supreme Court in which it is held that, so far as it attempts to confer upon the national banks the power to carry on the business of acting as executors and trustees and registrars of bonds, the statute is unconstitutional. The question is not one that can be settled by the decision of the Supreme Court of a single State. It is likely to be the subject of controversy and further litigation, and even if the banks and trust companies should agree to divide the field between them, it is important that there should be a clear understanding of the constitutional question that is involved in giving to a bank created by act of Congress the power to engage in a business other than that for which National Banks have been erected.

There was a time when the power of Congress to extend the functions of national banks at the expense of companies organized by the States, would have aroused general opposition, and the policy of strict or lax construction of the Constitution would have been the subject of heated discussion. In these days we are willing to adopt whichever construction of the Constitution will best accomplish the desired result, and the tendency is toward an extension of the Federal power. This is a natural result of the increased national consciousness in a country in which the States, although

legally autonomous, are becoming socially and commercially little more than geographical divisions. The independence of the States, their responsibility for the law of persons and property and social relations, is too valuable to be lost or impaired. The very fact that the people no longer dread the exercise of all useful powers by the general government, makes it the more necessary that it should be distinctly borne in mind that the Federal government is one of limited powers and that, while within its sphere its sovereignty is supreme, there are regions within which the power to legislate belongs to the States alone. Through its power to regulate commerce, the control of the government of the United States has in recent years been extended to many matters which formerly were left to the control of the States. Because of the extension of commerce between the States and of the increase in the variety and efficiency of the means of commerce and transportation, the power of Congress, beginning with control over navigation, has been extended to the regulation of transportation by railroads and communication by telegraph and telephone, to the building of bridges over streams between States, and more recently, to the regulation of the liability of employers to workmen upon interstate railways. The United States courts have dealt with combinations and boycotts among men engaged in manufacturing when it appeared that the design was to cripple the operation of factories for the purpose not merely of preventing manufacture, but also of destroying interstate trade in the articles manufactured.[1] It has been earnestly argued of late that although manufacturing is not commerce, yet the United States may lawfully organize corporations to engage not only in transportation, but also in manufacturing goods to be used in interstate and foreign trade.[2] Salutary results in the suppression of evil practices have been accomplished by means of the control of the United States over the mails. Lotteries have been suppressed by forbidding the transportation of tickets and advertisements and Congress has provided that articles not complying with its pure food laws shall not be carried in interstate commerce and this has been approved by the Supreme Court.[3] Now it is urged that Congress may constitutionally enact a law by which articles manufactured by the

[1]The Danbury Hatters' Case (Loewe *v.* Lawlor) (1908) 208 U. S. 274, 28 Sup. Ct. 301.

[2]Social Reform and the Constitution, by Frank J. Goodnow, The MacMillan Co., New York, 1911.

[3]Hipolite Egg Co. *v.* United States (1911) 220 U. S. 45, 31 Sup. Ct. 364.

labor of children in factories may not be transported between the States or foreign countries.

The last case is perhaps an extreme illustration of the tendency to make use of the Federal power because it best serves the purpose to be accomplished, and when there is a strong desire to accomplish a good purpose any objection on constitutional grounds is likely to be regarded as academic. For this reason Federal incorporation with the attendant regulation of large manufacturing corporations engaged in interstate commerce, is likely to be considered by the public as a practical rather than as a constitutional question, and the same is true of the question whether national banks may be invested by Congress with the powers of trust companies. The idea of a Federal corporation has become familiar because of the creation of national banks, and the power of the United States to create a corporation being established, and the corporations having been formed, it is natural to assume that they are endowed with all the powers commonly exercised by the artificial persons we call corporations. Thus, we may easily forget that as the purposes for which corporations may be created by the Federal government are limited to those that are within the scope of the powers delegated to Congress and not reserved to the States, so also the powers conferred upon the corporations cannot go beyond those that are reasonably necessary and proper for accomplishing those purposes.

National banks having been created under act of Congress as financial instruments of the government and for their greater efficiency having been endowed with the power to engage in private banking business, Congress has now attempted to confer upon them additional powers now commonly exercised by trust companies and by some of the state banks, namely, the powers involved in the business of acting as trustee, executor and administrator, and the registrar of stocks and bonds.

This extension of the functions of the national banks is made under the authority of the act for establishing Federal Reserve banks. There is nothing in the title of the act that suggests any extension of the powers of the national banks, nor does the act purport directly to confer any additional powers upon them, but in Section 11, enumerating the powers of the Board, paragraph k declares that the Board shall have power "to grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator or registrar of stocks and bonds, under such rules as the said Board may prescribe."

It is under this paragraph that the Federal Reserve Board has designated certain national banks as empowered to exercise the functions commonly exercised by trust companies, and many banks have accepted the authority, and engaged in the business. Their right to do so has been contested in the courts and there is one case at least that has been argued and decided. This was brought in the Supreme Court of Illinois by the Attorney General on the relation of a national bank against the auditor of accounts, asking for a mandamus upon him to issue a certificate to the national bank of authority to act under the State Trust Company act. There was a demurrer and the writ was denied. The opinion of the Court was delivered by Farmer, Chief Justice, at the October Term, 1915. It has been printed and distributed by authority of the Attorney General and is reported in the North Eastern Reporter.[4]

It was insisted on behalf of the national banks that the powers authorized to be conferred upon them by the Federal Reserve Board are powers akin to those commonly exercised by banks, and are in fact exercised by banking associations organized under state laws, and that in view of the competition of the trust companies and the state banks, it is essential to the successful operation of national banks that they should be given the right to engage in the business of acting as executors and trustees. They have always had the power to act as trustees with respect to special deposits and other funds. They may borrow money for the express purpose of lending it for profit.[5] As pledgees of stock as collateral they may become the owners of the stock and be subject to the liabilities of stockholders;[6] they may make collections for others;[7] they may guarantee the payment of commercial paper as incidental

[4]People *ex rel* First Nat. Bank of Joliet *v.* Brady (1915) 110 N. E. 864; Barr, McNaughton & Barr, for the petitioner, on behalf of the national banks, and Patrick Lucey, Attorney General and Thomas J. Dempsey, Ass't Attorney-General for respondent on behalf of the trust companies. Lester H. Strawn, Ass't. Attorney-General of counsel.

There is a recent case in New Hampshire in which it is held that a national bank having a permit from the Reserve Board, cannot be appointed administrator where the state statute declares that no corporation shall hereafter be appointed administrator. Appeal of Woodbury (N. H. 1915) 96 Atl. 299.

[5]Aldrich *v.* Chem. Nat. Bank (1899) 176 U. S. 618, 20 Sup. Ct. 498.

[6]National Bank *v.* Case (1878) 99 U. S. 628.

[7]Exchange Nat. Bank *v.* Third Nat. Bank (1884) 112 U. S. 276, 5 Sup. Ct. 146; Logan County Nat. Bank *v.* Townsend (1891) 139 U. S. 67, 11 Sup. Ct. 496.

to the exercise of the power to buy and sell the same.[8] All these powers are incidental to the functions of a bank and within their recognized powers in the transaction of private business.[9] The express power to act as executors and trustees, therefore, is not different from the powers they already possess. Executors are in fact trustees and banks already have power to act as trustees. Congress empowered the national banks to exercise all such powers as should be necessary to carry on the business of banking. The exercise of these powers constitutes private business pure and simple. These private functions were conferred by Congress to preserve and animate its creature that thereby it might better serve the government in the beneficial and efficient performance of its public functions."[10]

It is within the discretion of Congress to enlarge to some extent the scope of the operations of the national banks and Congress is the sole judge of what powers it is necessary and proper to give the banks in order that they may successfully maintain themselves and be able to render efficiently those services to the nation for which they were created. The business of the bank constitutes its capacity to perform its function as a machine for the money transactions of the government.[11] It has always been the policy of Congress to maintain the national banks on a working equality with the state banks. State banks are now usually clothed with authority to execute trusts and this has been a substantial source of income. The use of these banks for this purpose has become popular, and it may well have been the judgment of Congress that it was necessary to afford an equal opportunity to the national banks in order to insure the necessary and proper administration of their public function.

On the other hand, on behalf of the trust companies it was argued that the power to create corporations not being among the enumerated powers of the United States, corporations could be incorporated only as instruments for the purposes of the government and it was only for such purposes that banks could be created by Congress, and unless trust companies serve such public purposes they could not be created by Congress. Justice Matthews, speaking for the Supreme Court, has said that trust companies in New

[8]Thomas *v.* City Nat. Bank (1894) 40 Neb. 501, 58 N. W. 943.

[9]Easton *v.* Iowa (1903) 188 U. S. 220, 238, 23 Sup. Ct. 288.

[10]Brief for petitioner in People *v.* Brady, Sup. Ct. of Ill. Oct. Term, 1915 pp. 69, 70.

[11]*Ibid.*, 69, 70.

York, according to the powers conferred upon them by their charter and habitually exercised are not in any proper sense of the word, banking institutions.[12] The distinction between banking and acting as trustee is fundamental. In one, the relation is that of debtor and creditor. In the other, that of *cestui que trust* and trustee, and the functions of the trust company have no relation to the functions of a bank as an agency of the government.

The creation and management of trusts and administration of estates and the acting as registrar of stocks and bonds are matters peculiarly for state regulation. This is especially true of the administration of estates of deceased persons. Congress cannot give to a corporation power over matters or purposes over or for which Congress may not lawfully legislate nor interfere with the agencies provided by the State in matters subject to its own control. Although the powers heretofore conferred by Congress upon national banks included the function of private banking, these powers were given them in order to encourage and sustain them so as to serve better their public purpose, and it does not follow that Congress may also give powers which relate to matters which are within the peculiar province of the States, as the States cannot by consent give Congress any power which it does not possess under the Constitution. If Congress had thought it necessary for the maintenance of the national banks as instrumentalities of the government to give them power to act as trust companies, it would have made the grant of power general and compulsory rather than elective and permissive. It was insisted also that in the Reserve Bank act Congress did not itself confer power on the national banks to act as executors and trustees, but only delegated to the Reserve Board the right to confer this authority, and that this was a legislative power which could not be delegated.

The Court held that the legislative power had been exercised by Congress itself and not delegated, the power exercised by the Reserve Board being merely administrative. On the question of the constitutionality of the act the Court accepted and adopted the arguments of the counsel for the trust companies and held that the government of the United States was one of limited powers, that the authority given to the national banks to transact private banking business was given to them only because in dealing with and lending money they were essential instruments of the United States in the fiscal operations of the government, and their private busi-

[12]Mercantile Bank *v.* New York (1887) 121 U. S. 138, 159, 7 Sup. Ct. 826; also Jenkins *v.* Neff (1902) 186 U. S. 230, 22 Sup. Ct. 905.

ness was necessary to their efficiency for that purpose; that the business of trust companies in acting as executors and trustees was different and distinct from that of banks; that having no express or implied power to create trust companies, Congress could not vest national banks with the powers of such companies unless they were reasonably necessary to the efficiency of the banks as governmental agencies and that if Congress had believed this to be the case, such power would have been given to national banks, and the grant of power would not have been merely elective and permissive.

On the question whether the Federal Reserve act does not avoid conflict with the laws of Illinois by the provision that the permission is authorized only when not in contravention of the state or local law, the court held that no regulation of the trust business by the state authorities is recognized in the Act and that the rules of the Board provide for the management of the trust business as a separate department subject to thorough regulation by Federal offices and that such regulation is compatible with the regulation prescribed by the laws of the State.[13]

This decision is not conclusive beyond the jurisdiction of the State in which it was rendered. It involves, as I have said, questions of constitutional as well as of practical importance, and it may be worth while to consider the arguments on both sides of the question whether Congress can under the Constitution confer upon national banks the powers which it authorized the Reserve Board to confer upon them.

There are two principal questions involved in the controversy: Is the business of acting as trustees, executors and administrators, and as registrars of stocks and bonds within the borders of the several States a matter peculiarly within the control of the States? Is it beyond the power of Congress under the Constitution to confer this power upon corporations organized under Federal laws? The business of the trust company includes something more than

[13]The case is reported in 110 N. E. 864. The arguments are stated in the respondents' briefs in People *v.* Brady, *supra*, and also in the brief for the relators in Fellows, Attorney-General of Michigan, on relation of the Union Trust Co. *v.* First Nat. Bank of Bay City (Sup. Ct. of Mich., Sept. 1915) (not yet reported). Some of the leading cases cited were: M'Culloch *v.* Maryland (1819) 17 U. S. 316; Osborn *v.* Bank of U. S. (1824) 22 U. S. 738; United States *v.* Harris (1882) 106 U. S. 629, 1 Sup. Ct. 601; Farmers' etc. Nat. Bank *v.* Dearing (1875) 91 U. S. 29; Davis *v.* Elmira Savings Bank (1896) 161 U. S. 275, 16 Sup. Ct. 502; United States *v.* Fox (1876) 94 U. S. 315; Pennoyer *v.* Neff (1878) 95 U. S. 714; Yonley *v.* Lavender (1874) 88 U. S. 276.

these powers. Trust companies exercise certain banking powers. They receive money on deposit and lend it for profit in the purchase and even in the discount of notes and bills of exchange, as well as upon bonds secured by mortgages or deeds of trust. They are financial agencies and serve for the accumulation and distribution of capital, and so might be made use of by the government of the United States, in its fiscal operations and carrying out the ends for which it was created. The present question relates solely to those functions of the trust company that consist in acting as executors, trustees, administrators and registrars of stocks and bonds. There is no doubt that corporations organized under the laws of the United States and acting for the purposes for which they were created, may incidentally become trustees of property that comes into their possession, just as national banks are trustees of money held on special deposit, and being legal persons and authorized to hold property, have the powers and are subject to the obligations under the laws of the States within which they act. If they are organized under the power to regulate commerce and carry on interstate trade or interstate transportation, they may become trustees either by agreement, or by force of law, and are subject to the laws of the State with respect to the holding or disposition of property. It does not follow, however, that corporations may be created or empowered by Congress to serve as the instruments by which to carry out the law of the State which creates legal and equitable interests in property, and provides for the management and distribution of estates. The rights and duties of the trustees with reference to the property in their charge are created by state law and enforced by the courts of the United States only when for special reasons they have acquired jurisdiction over the property or the parties. "Every State", says Mr. Justice Field, in *Pennoyer* v. *Neff*,[14] "possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to . . . regulate the manner and conditions upon which property situate within such territory, both personal and real, may be acquired, enjoyed and transferred." The power to regulate the tenure and the modes of its acquisition and transfer whether *inter vivos* or at death, is particularly within the jurisdiction of the States, and not placed under the control of the Federal authority.[15]

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[14](1878) 95 U. S. 714, 722.

[15]United States *v.* Fox (1876) 94 U. S. 315; per Field, J.

The business of acting as trustee as it is conducted by the trust companies and as it must be conducted by national banks is necessarily subject to regulation and control by the States. But if the national banks are authorized by Congress to engage in it, they will be regulated by authority of Congress and by the rules already promulgated by the Federal Reserve Board, and if Congress really has any authority in the matter its rules must prevail and so the control of a business which is in effect the administration of state laws of property must be subject to the authority of Congress. The trust company business conducted by a national bank would be the business of a national bank and "national banks," says Mr. Justice White, "are instrumentalities of the Federal Government created for a public purpose, and as such necessarily subject to the paramount authority of the United States."[16] The paramount authority would necessarily interfere with the regulations made by the States with regard to the business of acting as trustee in a trust which arises out of state laws. This tends to show that the business of acting as trustee is not one for which Federal corporations could properly be formed and that the business is not one that such corporations could be authorized to undertake unless it were reasonably essential to the efficiency of the corporation for the Federal purposes for which it was created.

The office of executor or administrator is entirely the creation of the laws of the State. "The several States of the Union", said Mr. Justice Davis in the Supreme Court, "necessarily have full control over the estates of deceased persons *within their respective limits.*"[17] And again in the same opinion, he says: "The administrative laws of Arkansas are not merely rules of practice for the courts, but laws limiting the rights of parties, and will be observed by the Federal courts in the enforcement of individual rights." Justice Wayne in an earlier case said: "There can be no doubt that the laws of the State from which the executor or administrator derives his authority to act, must prevail, as well in the Federal as in the State tribunals."[18] It is from the States alone and not from the United States that administrators derive their authority and the authority of executors is derived from the will under the

[16]Davis *v.* Elmira Savings Bank (1896) 161 U. S. 275, 283, 16 Sup. Ct. 502.

[17]Yonley *v.* Lavender (1874) 88 U. S. 276, 279; see also Security Trust Co. *v.* Black River Nat. Bank (1902) 187 U. S. 211, 228, 23 Sup. Ct. 52.

[18]Union Bank of Tennessee *v.* Jolly's Adm'rs. (1855) 59 U. S. 503, 506.

laws of the States. "The Federal laws do not make provision for the appointment of executors or administrators. They only recognize the existence of such appointments under the local law."[19]

Executors and administrators are under the control of the Probate Courts, the courts of the old ecclesiastical jurisdiction, and there are no such courts in the Federal judiciary except in the territories and the District of Columbia. Doubts have been entertained whether a corporation aggregate can be an executor,[20] and it is usual in England when a corporation has been named in the will, to appoint persons called syndics to administer the estate and there is no question that the authority of corporations to act as executors or administrators must be derived from the state law, either the common law or a statute. As a matter of fact, the States generally have given to corporations organized for the purpose and under special regulation, the power to act as executors and administrators as well as trustees of estates of decedents and others, and they have given this power to foreign corporations; but in doing so they have required the foreign corporations to submit to all the conditions and regulations imposed upon trust companies of their own creation. The question was raised in the suit in the Supreme Court of Illinois whether the state regulations imposed upon foreign corporations were applicable to or could be imposed upon banks organized under acts of Congress. If the authority of executors and administrators is derived from the States and the States alone have the power to say under what conditions corporations shall act in this capacity, the power of the United States with respect to these corporations of their own creation becomes subordinate to that of the States, and this is inconsistent with the sovereignty of the United States, and yet the United States within the sphere of its sovereignty is supreme.

If national banks were authorized to act as executors and administrators, and these became a part of the business under authority of Congress and one of the faculties with which they were endowed in order to enable them to serve the fiscal operations of the United States, this business and the right to engage in it would be free from taxation on the part of the States for the same reason that their banking business was declared in *Osborn* v. *United States Bank* to be free from such taxation.[21]

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[19]Mellus *v.* Thompson (D. C. 1858) 1 Cliff. 125, 130.

[20]1 Williamson, Executors, 184 and cases cited.

[21](1824) 22 U. S. 738, 860, 861.

The national banks, unlike the United States Bank, were not expressly given power to sue in the United States Circuit Court, but if they engaged in the business of acting as executors and administrators and their authority were questioned, it might well be that the case would be one arising under the laws of the United States under which they could seek the jurisdiction of the United States courts. There are also other cases in which conflict of jurisdiction would arise, and it seems to be clear that the qualification to act as executor or administrator is peculiarly within the control of the several States, and that the United States has not power even incidentally to confer such power upon a corporation.[21a]

The power to act as registrar of stocks and bonds has no direct relation to any of the powers of the United States unless it relate to bonds of the United States or stocks and bonds of corporations erected by the United States for one of the purposes within the scope of its authority, as for example, national banks and railroads and other corporations engaged in interstate commerce.

Even if the functions of trustees, executors and administrators or registrars of stocks and bonds are not exclusively within the control of the States, the question remains whether the right to confer these functions upon corporations is within the power of Congress under the Constitution. If Congress has power to confer upon the national banks the privilege of engaging in private banking business, may it not have power to give them additional privileges now commonly enjoyed by state banks? This must depend upon the question whether it is a power incidental and reasonably necessary to the efficiency of the corporation for the service of the government in its fiscal operations, or in carrying into effect its power under the Constitution. The power of Congress to create corporations does not involve the power to create corporations for all purposes, but only for the purposes within the scope of the powers of the Federal government.

The power to create a corporation is not found among the enumerated powers conferred upon the United States. It is implied as incidental to other powers. "It is", says Chief Justice Marshall, "never the end for which other powers are exercised,

[21a] In Appeal of Woodbury (Supreme Court of New Hampshire, Dec. 7, 1915) 96 Atl. 299, it was held that a national bank having the permit of the Federal Reserve Board could not be appointed administrator in face of a recent statute of New Hampshire forbidding the appointment of any trust or banking company as executor or administrator.

but a means by which other objects are accomplished."[22] The purposes for which corporations may be created by the United States are therefore only those for which the power of the United States may be exercised. When the question arose over the power of Congress to create the second Bank of the United States, the power was sustained on the ground that the bank was an instrument which was "necessary and proper for carrying into effect the powers vested in the government of the United States."[23] The power to create the corporation was treated as merely incidental to carrying out other and substantive powers expressly conferred upon Congress. The power of Congress to create corporations was so considered by Alexander Hamilton.[24] Chief Justice Marshall said in a later case: "The Bank is not considered as a private corporation whose principal object is individual trade or individual profit, but as a public corporation created for public and national purposes . . . It was not created for its own sake or for private purposes. It has never been supposed that Congress could create such a corporation. The whole opinion of the Court in the case of *M'Culloch* v. *Maryland* is founded on and sustained by the idea that the Bank is an instrument necessary and proper for carrying into effect the powers vested in the government of the United States."[25] Among these powers, he said, he found "the great powers to levy and collect taxes, to regulate commerce, to borrow money, to declare and conduct a war and to raise and support armies and navies;" and he referred especially to the power of raising revenue and conveying money from place to place as one of the powers to which the creation of a corporation would be a necessary and proper means.[26]

Again in *Osborn* v. *Bank of the United States*[27] Chief Justice Marshall, answering the question "Why is it that Congress can incorporate or create a Bank?" said: "This question was answered in the case of *M'Culloch* v. *the State of Maryland*. It is an instrument which is 'necessary and proper' for carrying on the fiscal operations of government" and for this reason, he held that the bank

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[22]M'Culloch *v.* Maryland (1819) 17 U. S. 316.

[23]M'Culloch *v.* Maryland, *supra*; Osborn *v.* Bank of U. S. (1824) 22 U. S. 738.

[24]Hamilton's Works, Fed. Ed. Vol. 3, 446-448; 26 Harvard Law Rev. 672.

[25]Osborn *v.* Bank of U. S. (1824) 22 U. S. 738, 860.

[26]M'Culloch *v.* Maryland (1819) 17 U. S. 316, 407, 409.

[27]*Supra*, n. 25.

must be endowed with that faculty of lending and dealing in money which was conferred by its charter. The powers conferred upon the Bank of the United States were the usual powers conferred upon banks: the power to lend and deal in money, to discount and purchase commercial paper, and to issue notes to circulate as money. Similar banks had already been incorporated by the Congress of the United States. Trust companies as now constituted did not exist and there were no corporations organized for the purpose of acting as trustees or executors. It was the ordinary commercial bank that was recognized as a necessary and proper means to be created by Congress for executing the powers conferred by the Constitution upon the United States. The Charter of the Bank of the United States was repealed and in 1864 Congress authorized the incorporation of national banks. Of this act Justice Swayne said: "The constitutionality of the act of 1864 is not questioned. It rests upon the same principle as the act creating the second Bank of the United States. The reasoning of Secretary Hamilton and of the Court in *M'Culloch* v. *Maryland,* therefore, applies. The national banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of necessity which existed for creating them, Congress is the sole judge."[28]

The necessity the Justice referred to was the necessity of creating banking corporations. The banks he had in mind were merely commercial banks with all such incidental powers as are necessary to carrying on the business of banking by discounting and negotiating promissory notes, etc., by receiving deposits, by buying and selling coin and bullion, by loaning money on personal security and by obtaining, issuing and circulating notes. They had not been given the power to act as trustees, executors and registrars of stocks and bonds. It was the faculty of lending and dealing in money that Chief Justice Marshall found to be the vital part, the soul, of the United States Bank, which alone could bring it into useful existence, and he said: "Can this instrument [for carrying on the fiscal operations of the government] on any rational calculation effect its object unless it be endowed with that faculty of lending and dealing in money which is conferred by its charter? If it can, if it be as competent to the purposes of the government

[28]Farmers' Nat. Bank *v.* Dearing (1875) 91 U. S. 29, 33.

without, as with that faculty, there will be much difficulty in sustaining that essential part of the charter."[29]

If, instead of the faculty of lending and dealing in money, the faculties conferred upon the second Bank of the United States had been those of acting as executor and administrator, or of accepting and executing trusts and acting as registrar of stocks and bonds, it may well be doubted whether Chief Justice Marshall would have regarded these faculties as essential to its existence as an instrument for carrying on the fiscal operations of the government. He would have thought they would have been quite as competent for the purposes of the government without these faculties as with them. These powers are not, like lending and dealing in money, discounting notes and issuing bills as money, the vital part, the soul of a national bank. The business of acting as executor and administrator is of course quite foreign to the public purposes of the Federal government for which the national banks were created, and it is only to enable them to serve these public purposes that they may be authorized to engage in private business. The business of accepting and executing trusts, acting as trustee of corporation mortgages, holding and managing estates and acting as registrar of stocks and bonds has in itself no relation to the fiscal operations of the government, nor has it any direct relation to the purposes for which the national banks were created.

There is, moreover, a fundamental distinction between the faculty of engaging in the banking business and the faculty of accepting and executing trusts. In the case of the bank the relation between the bank and its depositor is that of debtor and creditor and the investment of money is made by the bank for its own profit. On the other hand money accepted in trust is held for the benefit of the person who entrusts it to the keeping of the trustee and the equitable title to the money and to the profits remains with him. Trust companies are distinguished from banks by the United States Supreme Court in *Mercantile Bank* v. *New York*,[30] where Justice Matthews says: "Trust Companies, however, in New York, according to the powers conferred on them by their charters and habitually exercised, are not in any sense banking institutions." The distinction may be a close one, and this may be one of degree. Trust companies do in fact receive money on deposit and engage in

[29]Osborn *v.* Bank of U. S. (1824) 22 U. S. 738, 861.

[30](1887) 121 U. S. 138, 159. For definitions of trust companies and cases on the subject see 38 Cyc 2116; 5 Cyc 612.

the banking business; and state banks accept and execute trusts. But the distinction between the powers of trust companies as such, and the powers of the banks, is a vital one, and the power to accept and execute trusts cannot be conferred upon a bank as an incident to the business of banking.

It has come about, however, that companies organized as trust companies are exercising many of the functions of banks and that the state banks are enjoying the powers of trust companies. The trust companies have acquired control of large accumulations of capital and are a power to be reckoned with in the financial world. Their business is profitable, they are formidable competitors of the national banks and it may well be that now or at some future time, Congress may determine that in order to maintain the prestige of the national banking system and the efficiency of the national banks as instruments of the government, it is necessary to give the national banks the powers that are now exercised by the trust companies. Whether Congress may lawfully do this will depend on whether conferring these powers upon the national banks is in fact reasonably necessary to maintain the banks as efficient instruments for the purposes for which Congress has power under the Constitution to create them. Neither banks nor trust companies are in themselves objects within the power of Congress to create. It is not enough to show that the trust company powers will increase the business of the banks and add to their profit. It ought to appear that these powers have some real and effective relation to carrying out some of the purposes for which Congress is authorized to legislate, or else that they are reasonably necessary to maintain the efficiency of the banks as instruments for accomplishing objects within the scope of the sovereignty of the Federal government. There is no doubt that the national banks have hitherto proved themselves efficient agencies for carrying out these purposes and Congress has not yet decided that it is necessary for the continuance of that efficiency that they should all possess the additional powers now exercised by trust companies. It has only authorized these powers to be given to such banks as may apply for them, and if the courts should be called on to decide this question, they would not have the benefit of the judgment of Congress in the affirmative, and they would be met with the difficulty that the powers of acting as executors and administrators are wholly within the control of the States, and that the business of accepting and executing trusts by national banks will involve conflicts with the

States in the regulation of the business of dealing with property peculiarly within the jurisdiction of the States.

This suggests the question whether the Federal Reserve act has anticipated this objection by declaring that the permission given to the national banks to act as executors and trustees or registrars of bonds should be given only "when not in contravention of state or local law". What is the effect of this clause? Does it imply that the board, before granting the permit must determine whether it would be in contravention of the State law for the Federal corporation to act as executor or trustee or registrar of stocks and bonds; or does it mean that it is only when the State consents or acquiesces that the Federal license is to be given to the national banks; and if this is the meaning of the act, is it within the power of Congress to confer upon national banks the powers which the Federal Reserve act purports to give?

In the case of *People* v. *Brady*,[31] the decision was that the laws of Illinois confer large powers upon State officers for the regulation and control of companies engaged in the administration of trusts or decedents' estates, and that this control is in fact entirely excluded by the control necessary to be exercised by Federal officers under rules to be prescribed by the Federal Reserve Board. The Court said the control of any department of a national bank must be under Federal rather than State government, citing *Farmers', etc., National Bank* v. *Dedring*,[32] *Davis* v. *Elmira Savings Bank*,[33] and *Easton* v. *Iowa*,[34] and that the States have no authority, whether with hostile or friendly intent, to interfere with national banks, or their officers in the exercise of the powers bestowed on them by the National government.

The same conditions exist in practically all the States. Under the principle of this decision, the exercise of the control of the trust department of the national bank by Federal officers would necessarily be in contravention of state or local law. This condition must have been well known to Congress and in using the phrase "when not in contravention of state or local law" it can hardly have been intended either that the Reserve Board should determine whether in any particular State there were no provisions for the regulation of the business of trust companies before they

[31] (1915) 110 N. E. 864.

[32] (1875) 91 U. S. 29.

[33] (1896) 161 U. S. 275, 16 Sup. Ct. 502.

[34] (1903) 188 U. S. 220, 23 Sup. Ct. 288.

gave permission to the national banks; or that the regulations of the Reserve Board should be made in conformity with the regulations under the state law.

It does not seem likely that Congress intended the act to apply only to those few States in which there were no statutory provisions regulating the business of trust companies. It is the States in which trust companies are most active in which national banks are likely to apply for leave to engage in the business. There is no suggestion in the act that the rules of the Reserve Board are to conform to those of the States where the banks are located. It is evidently the intention that the Reserve Board is to make its own rules and that the banks shall be subject to the supervision of Federal officers. It may have been considered that as the States permit foreign trust companies to transact business within their borders, so they might permit national banks to carry on the business of trust companies, but foreign corporations are subject to state regulation and subject to any condition the States may please to prescribe. Federal corporations are not foreign corporations. They are created and governed by the laws of the United States, and those laws within the scope of the sovereignty of the United States are supreme and the State is without power to enforce against national banks the provisions of state acts regulating trust companies.[35]

Even though the state law, as in Illinois, should give authority to transact the business of acting as trustee, to any corporation organized by law to accept and execute trusts, the authority so given to a Federal corporation would be subject to the regulation under the Federal laws and these would prevail over those of the State. They would be in contravention of them unless they conformed to them.[36]

Another suggestion is that the permit from the Reserve Board may be regarded as a mere license given to the bank by the authority that created it to be exercised only in case of the consent or acquiescence of the State. The Federal authority permits it and

[35]Commonwealth *v.* Texas & Pac. R. R. (1881) 98 Pa. 90; Matter of Cushing (1903) 40 Misc. 505, 82 N. Y. Supp. 795; Davis *v.* Elmira Savings Bank (1896) 161 U. S. 275, 283, 16 Sup. Ct. 502; Easton *v.* Iowa (1903) 188 U. S. 238, 23 Sup. Ct. 288; Brown *v.* Maryland (1827) 25 U. S. 419; M'Culloch *v.* Maryland (1819) 17 U. S. 316.

[36]When the state law, even though subsequent to the Federal Reserve act, forbids the appointment of trust companies or banking companies as executors or administrators, a trust company may not be appointed even though it has a permit from the Reserve Board. Appeal of Woodbury (N. H. 1915) 96 Atl. 299.

the State makes no objection and who is to find fault? It may be that this suggests the practical outcome of the controversy. It may be that elsewhere, as well as in New Jersey, the Attorney General will decline to sue out a quo warranto unless it is understood that the question raised shall not be the constitutionality of the act, but only whether there is a contravention of state laws. There is a tendency now not to insist too strongly upon the constitutionality unless it serves a practical purpose to do so, but it is not safe to go on ignoring questions of constitutional power in corporations whose acts affect large business interests, nor is it well to allow the distinction between Federal and State jurisdictions to be obliterated gradually for failure to determine the scope of the authority of Congress and the States.

The creation of corporations is an act of sovereignty, but in this country the sovereignty is divided between the States and the United States, and the powers of the corporation created by each are limited by the scope of the powers which belong to each. Is not a question of the extent of the powers of a Federal corporation a question of *ultra vires?* Can the corporation exercise powers in matters beyond the scope of the sovereignty of the government which created it? The question is one that will arise more frequently with the increasing tendency toward the creation of corporations under acts of Congress and to make use of the Federal control whenever it appears to promise greater efficiency. Federal incorporation of companies engaged in state and interstate commerce is within the power of Congress. It will remove many difficulties and serve important ends. It is not to be discouraged and the corporations ought not to be hampered by technical objections, but it must be remembered that the mere creation of a corporation does not give it all the powers of a natural person. Its powers are only those which the government that created it has the authority to grant, and they are limited to such as are germane to matters within the constitutional power of that government. The States and the United States have certain distinct fields of operation, certain separate parts of the sovereign authority, and it will only lead to confusion if each is allowed to confer upon its own corporations powers which belong to the other alone.

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NOTES.

DOCTRINE OF DE FACTO DIRECTORS.—The necessity of maintaining the supremacy of the government has led to the universal adoption from early times of the rule that the acts of those actually occupying a public office are valid as to the public.[1] From public officers, including officers of municipal corporations, the step is a short one to officials of private corporations, to whom also applies the inconvenience and impossibility of investigation by third persons into the details of an election. The early cases apply the doctrine to private corporations with little or no discussion of theory, and no distinction is made between public and private corporate officers.[2] But in sustaining the acts of the latter there is not the same public interest, and the *de facto* doctrine

[1]Constantineau, De Facto Doctrine, §§ 3-4.

[2]Baird *v.* Bank of Washington (Pa. 1824) 11 Serg. & R. 411; Hall *v.* Carey (1848) 5 Ga. 239; McCall *v.* Byram Mfg. Co. (1827) 6 Conn. 428.

is generally limited in extent to the necessity on which it rests. The better opinion of judges and text writers seems to be that the doctrine of *de facto* directors differs from that of *de facto* public officers and depends on the rule of ostensible agency,[3] or the right of third parties to disregard the irregularities of internal corporate management.[4] The rule rests on business expediency,[5] and its extent should be measured thereby.

The tests of *de facto* public officers have frequently been resorted to in order to determine who are corporate directors and officers *de facto*,[6] but the decided cases have by now built up an independent body of precedents as to the requirements for *de facto* directors. The existence of a *de jure* office is not generally required,[7] and where more directors are elected than are authorized, all are treated as directors *de facto*.[8] The ineligibility of the man elected is no bar,[9] nor his failure to perform the acts prescribed for taking office.[10] There must be color of election,[11] but the election may be by persons insufficient in number[12] or not qualified to vote,[13] and it is no objection that the

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[3]Umatilla Water Users' Assn. *v.* Irvin (1910) 56 Ore. 414, 108 Pac. 1016; Lovett *v.* German Ref. Church (N. Y. 1851) 12 Barb. 67; see Despatch Line *v.* Bellamy Mfg. Co. (1841) 12 N. H. 205; Wright *v.* Lee (1892) 2 S. D. 596, 51 N. W. 706. Although not technically resting on estoppel, it does so fundamentally, and is often so stated. Kuser *v.* Wright (1894) 52 N. J. Eq. 825, 31 Atl. 397; Matter of Santa Eulalia etc. Co. (1889) 51 Hun 640, opinion in 4 N. Y. Supp. 174; Taylor, Private Corporations (5th ed.) § 189.

[4]See Scanlan *v.* Snow (1894) 2 App. D. C. 137; 2 Machen, Corporations, §§ 1473, 1477.

[5]See *In re* County Life Assur. Co. (1870) L. R. 5 Ch. *288; Moses *v.* Tompkins (1888) 84 Ala. 613, 4 So. 763.

[6]Baird *v.* Bank of Washington, *supra*; McCall *v.* Byram Mfg. Co., *supra*.

[7]The recognition of a *de facto* officer generally requires the existence of a *de jure* office. 9 Columbia Law Rev., 182.

[8]Werle *v.* Northwestern etc. Co. (1905) 125 Wis. 534, 104 N. W. 743. Where the board is reduced a similar rule applies. Bradford *v.* Frankfort etc. R. R. (1895) 142 Ind. 383, 40 N. E. 741, 41 N. E. 819.

[9]This is true where the persons are not residents, Delaware & Hudson Canal Co. *v.* Pennsylvania Coal Co. (1853) 21 Pa. 131; Copper Belle Min. Co. *v.* Costello (1909) 12 Ariz. 318, 100 Pac. 807, or where they are not stockholders, Steam-Engine Co. *v.* Hubbard (1879) 101 U. S. 188; Jones *v.* Bonanza Min. & Mill. Co. (1907) 32 Utah 440, 91 Pac. 273, unless a statute expressly forbids non-stockholders to act as directors. *In re* Newcomb (1891) 18 N. Y. Supp. 16. Directors may continue in office *de facto* after they have parted with all their stock. Kuser *v.* Wright, *supra*; Robinson *v.* Blood (1907) 151 Cal. 504, 91 Pac. 258.

[10]Omission of filing acceptance, Young *v.* Schenck (1911) 64 Wash. 90, 116 Pac. 588, bonding, Bank of United States *v.* Dandridge (1827) 25 U. S. 64, swearing in, Simpson *v.* Garland (1884) 76 Me. 203.

[11]Hall *v.* Carey, *supra*; Franco-Texan Land Co. *v.* Laigle (1883) 59 Tex. 339.

[12]Baird *v.* Bank of Washington, *supra*; Baggot *v.* Turner (1899) 21 Wash. 329, 58 Pac. 212.

[13]Charitable Assn. *v.* Baldwin (1840) 42 Mass. 359; People *v.* Northern R. R. (1870) 42 N. Y. 217; but see Exline-Reimers Co. *v.* Lone Star Life Ins. Co. (Tex. Civ. App. 1915) 171 S. W. 1060. The doctrine that officers chosen by *de facto* officers are officers *de jure* is generally discredited. 12 Columbia Law Rev., 265.

meeting was irregular as to place, time, or lack of the required notice.[14] The important thing is that the person should act as an officer and have the reputation of being such with the acquiescence of the corporation.[15]

It is in determining the validity of the acts of *de facto* directors that the difference from *de facto* public officers becomes important. All courts agree in holding the corporation bound by the action of the *de facto* officers in favor of third persons, such as the making of deeds, mortgages, and promissory notes.[16] Their actions are valid in litigation by or against third parties.[17] But the validity of their acts in favor of the corporation[18] or the directors themselves[19] is generally denied. Opposed to this is the strict view, brought over from the rule of public officers, that *de facto* directors may be impeached only on direct proceedings.[20] But such proceedings would be ineffective to protect the stockholders and lawful officers, even after judgment of ouster,[21] and equity has interfered by injunction to prevent the

[14]The meeting may be held in a foreign state, Franco-Texan Land Co. *v.* Laigle, *supra*; Ohio & Miss. R. R. *v.* McPherson (1864) 35 Mo. 13, or after the designated day, Burr's Exr. *v.* McDonald (1846) 44 Va. 215, or without the requisite notice. Merchants' Nat. Bank *v.* Citizens' Gas Lt. Co. (1893) 159 Mass. 505, 34 N. E. 1083.

[15]Johnston *v.* Jones (1872) 23 N. J. Eq. 216; Mechanics Nat. Bank *v.* Burnet Mfg. Co. (1880) 32 N. J. Eq. 236; Orr Water Ditch Co. *v.* Reno Water Co. (1882) 17 Nev. 166, 30 Pac. 695; Waterman *v.* Chicago & Iowa R. R. (1892) 139 Ill. 658, 29 N. E. 689.

[16]Gleason *v.* Canterbury etc. Ins. Co. (1906) 73 N. H. 583, 64 Atl. 187, deed, Burr's Exr. *v.* McDonald, *supra*; Werle *v.* Northwestern etc. Co., *supra*, mortgage, Kuser *v.* Wright, *supra*; Hamilton Tr. Co. *v.* Clemes (1897) 17 App. Div. 152, 45 N. Y. Supp. 141, affd. (1900) 163 N. Y. 423, 57 N. E. 614; Copper Belle Min. Co. *v.* Costello, *supra*, notes, Savage *v.* Ball (1864) 17 N. J. Eq. 142; Merchants' Nat. Bank *v.* Citizens' Gas Lt. Co., *supra*; Barrell *v.* Lake View Land Co. (1898) 122 Cal. 129, 54 Pac. 594.

[17]Service may be made on *de facto* officers, McCall *v.* Byram Mfg. Co., *supra*; and they may file an answer, Mechanics Nat. Bank *v.* Burnet Mfg. Co., *supra*, or dismiss an appeal. Young *v.* Schenck, *supra*.

[18]Richards *v.* Attleborough Nat. Bank (1889) 148 Mass. 187, 19 N. E. 353. But a corporation can sue on a promise for which the consideration is the obligation of the *de facto* officers. Cahill *v.* Kalamazoo Mut. Ins. Co. (Mich. 1845) 2 Dougl. 124. Between third parties the acts of *de facto* officers are valid. Cooper *v.* Curtis (1849) 30 Me. 488; Baggot *v.* Turner, *supra*.

[19]Shellenberger *v.* Patterson (1895) 168 Pa. 30, 31 Atl. 943. The doctrine is sufficient to bring *de facto* directors under the disabilities, see Stetson *v.* Northern Inv. Co. (1898) 104 Iowa 393, 73 N. W. 869, and statutory liabilities of directors. Steam-Engine Co. *v.* Hubbard, *supra*; Hudson *v.* J. B. Parker Machine Co. (1899) 173 Mass. 242, 53 N. E. 867.

[20]Commonwealth *v.* Smith (1863) 45 Pa. 59; Atlantic T. & O. R. R. *v.* Johnston (1874) 70 N. C. 348; Modstock Min. Co. *v.* Harris (1902) 40 Nova Scotia 336; Young *v.* Schenck, *supra*. On direct proceedings, by *quo warranto* or under a statute, *de facto* existence is not recognized. People *v.* Albany & S. R. R. (N. Y. 1869) 55 Barb. 344.

[21]Actions of *de facto* officers are valid up to the time the judgment of ouster is filed. Mining Co. *v.* Anglo-California Bank (1881) 104 U. S. 192; but see Walker *v.* Flemming (1874) 70 N. C. 483, and have been held so even after judgment. Zearfoss *v.* Farmers etc. Institute (1893) 154 Pa. 449, 26 Atl. 210, 211. A statute ousting an officer automatically may destroy his *de facto* as well as *de jure* status. Cupit *v.* Park City Bank (1899) 20 Utah 292, 58 Pac. 839.

action of *de facto* directors where some ground for equitable jurisdiction is found.[22] Although the doctrine has been applied in controversies between rival claimants,[23] there seems no necessity for it and the better view is expressed by the recent case of *Stratton-Massachusetts Gold Mines Co.* v. *Davis* (Mass. 1916) 111 N. E. 375, in which *de facto* directors were denied the right to sue *de jure* directors in tort.[24] The doctrine should not be applied to questions of internal management and it would seem, in spite of a respectable array of authority to the contrary,[25] that the calls and subsequent forfeiture of stock by *de facto* directors cannot be enforced against a stockholder[26] unless the stockholder has estopped himself from denying the directors' title.[27] The necessity on which the rule depends requires that it apply only in favor of third persons[28] dealing with the corporation in ignorance of the defects in the directors' election,[29] but it must be admitted that it has not always been so limited.

Enforcement of Agreements to Support Aged Grantors.—The attitude of the courts towards grants of all or a large part of an old man's property, in return for the grantee's promise to support him in his declining years, stands out as a strong refutation of the criticism that our legal system holds slavishly to precedent and technicalities. Though the law abhors a forfeiture, and it is a general rule of property that words will be construed most strictly in order to avoid divesting an estate,[1] it is eqally well settled that contracts to support aged or infirm grantors, in consideration of a conveyance of property to the obligor, who is generally a relative or very near friend, belong to a peculiar class to which different rules are applicable.[2] Almost without exception,[3] it

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[22]See Johnston *v.* Jones, *supra*; Moses *v.* Tompkins, *supra.*

[23]Commonwealth *v.* Smith, *supra*; Atlantic T. & O. R. R. *v.* Johnston, *supra.*

[24]*Accord,* Ellsworth Woolen Mfg. Co. *v.* Faunce (1887) 79 Me. 440, 10 Atl. 250.

[25]Ohio & Miss. R. R. *v.* McPherson, *supra*; Steinmetz *v.* Versailles etc. Co. (1877) 57 Ind. 457; San Joaquin Land etc. Co. *v.* Beecher (1894) 101 Cal. 70, 35 Pac. 349; Jones *v.* Bonanza Min. & Mill Co., *supra.*

[26]People's Mut. Ins. Co. *v.* Westcott (1860) 81 Mass. 440; Moses *v.* Tompkins, *supra*; Schwab *v.* Frisco Min. & Mill. Co. (1900) 21 Utah 258, 60 Pac. 940; Garden Gully etc. Co. *v.* McLister (1875) 1 App. Cas. 39.

[27]Schenectady etc. Co. *v.* Thatcher (1854) 11 N. Y. 102; Macon & Augusta R. R. *v.* Vason (1876) 57 Ga. 314; Faure Elect. etc. Co. *v.* Phillipart (1888) 58 L. T. Rep. N. S. 525.

[28]Savage *v.* Ball, *supra*; Moses *v.* Tompkins, *supra*; State *v.* Curtis, (1874) 9 Nev. 325; Matter of George Ringler & Co. (1912) 204 N. Y. 30, 97 N. E. 593.

[29]Mere knowledge of irregularities in election seems insufficient to bar a plaintiff's right to avail himself of the doctrine. Scanlan *v.* Snow, *supra.* But actual knowledge and participation in the election would appear to bar him. Vestry of St. Luke's Church *v.* Mathews (S. C. 1815) 4 Desauss. Eq. 578.

[1]4 Kent, Comm., *129.

[2]Bruer *v.* Bruer (1909) 109 Minn. 260, 123 N. W. 813; Cree *v.* Sherfy (1894) 138 Ind. 354, 37 N. E. 787; see Brady *v.* Gregory (1912) 49 Ind. App. 355, 97 N. E. 452; Russell *v.* Robbins (1910) 247 Ill. 510, 93 N. E. 324.

[3]Where the grantor stipulates merely for a money annuity, cancelation is denied, but the amount of the annuity is generally declared a lien on the

is held that on breach of such a contract the grantor is entitled to recover the land.[4] But, though courts are in substantial accord on the general proposition that relief should be given, it is interesting to note the variety of grounds that they resort to in order to afford such relief.[5] Some, seemingly affected by the injustice of allowing the grantee to retain the land without performing his agreement, give relief solely for that reason, without attempting to refer the relief to any specific head of equitable interference.[6] Others order cancelation because there is no adequate remedy at law,[7] or for failure of consideration.[8] In some jurisdictions, a condition of support in the grant itself, or expressed or implied extrinsically, is construed as a condition subsequent,[9] and a breach thereof, in the absence of a clear waiver,[10] upon re-entry, or an act legally equivalent thereto,[11] works a forfeiture of the estate conveyed.[12] Still another view is that such an agreement creates a mortgage on the property which may be foreclosed on breach.[13] Perhaps the most curious rule is that applied in Illinois,

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property. See Doescher *v.* Spratt (1895) 61 Minn. 326, 63 N. W. 736; Gallaher *v.* Herbert (1886) 117 Ill. 160, 7 N. E. 511. The annual value of support has been computed and declared a lien on the property to attach annually, Webster *v.* Cadwallader (1909) 133 Ky. 500, 118 S. W. 327; Laxton *v.* Tilly (1872) 66 N. C. 327; *contra,* Brawley *v.* Catron (1837) 35 Va. 522; see Camp *v.* Gifford (N. Y. 1874) 67 Barb. 434, or in a gross sum based on the grantor's expectancy of life. Storey-Bracher Lumber Co. *v.* Burnett (1912) 61 Ore. 498, 123 Pac. 66; *contra,* Diggins *v.* Doherty (1885) 18 D. C. 172; see Frazier *v.* Miller (1854) 16 Ill. 48. When the grantee dies before the grantor it was held that the latter can charge the land for her support, but is not entitled to rescission. Keister *v.* Cubine (1903) 101 Va. 768, 45 S. E. 285. And when the grantor is dead and his heirs or representatives sue, cancelation is frequently refused, since the damages are ascertainable. Self *v.* Billings (1913) 139 Ga. 400, 77 S. E. 562; see Studdard *v.* Wells (1894) 120 Mo. 25, 25 S. W. 201; *contra,* Fluharty *v.* Fluharty (1903) 54 W. Va. 407, 46 S. E. 199.

[4]The doctrine applies even though the deed is absolute on its face, and the obligation is in the form of a separate contract, Tysor *v.* Adams (1914) 116 Va. 239, 81 S. E. 76; Dodge *v.* Dodge (1892) 92 Mich. 109, 52 N. W. 296, a bond to perform, Frazier *v.* Miller, *supra,* a mortgage conditioned on performance, Richter *v.* Richter (1887) 111 Ind. 456, 12 N. E. 698, an oral promise, Sherrin *v.* Flinn (1900) 155 Ind. 422, 58 N. E. 549; Lockwood *v.* Lockwood (1900) 124 Mich. 627, 83 N. W. 613, or is implied from the fact of the conveyance. Beck *v.* Hoyt (1872) 39 Conn. 9.

[5]Abbott *v.* Sanders (1907) 80 Vt. 179, 66 Atl. 1032.

[6]Lockwood *v.* Lockwood, *supra.*

[7]Lowman *v.* Crawford (1901) 99 Va. 688, 40 S. E. 17.

[8]Alvey *v.* Alvey (1906) 30 Ky. L. R. 234, 97 S. W. 1106.

[9]But see Lowman *v.* Crawford, *supra.*

[10]Jones *v.* Williams (1909) 132 Ga. 782, 64 S. E. 1081; Hubbard *v.* Hubbard (1867) 97 Mass. 188.

[11]On the necessity of re-entry, see 8 Columbia Law Rev. 326.

[12]Cree *v.* Sherfy, *supra*; Blum *v.* Bush (1891) 86 Mich. 206, 49 N. W. 142; Thomas *v.* Thomas (1893) 24 Ore. 251, 33 Pac. 565. In Glocke *v.* Glocke (1902) 113 Wis. 303, 89 N. W. 118, the court points out that equity first implies a grant on condition subsequent, and then cancels the deed, not to enforce a forfeiture, but to remove a cloud on the grantor's title, which has already revested on breach of the condition.

[13]Abbott *v.* Sanders, *supra*; Chase *v.* Peck (1860) 21 N. Y. 581; but see Bethlehem *v.* Annis (1860) 40 N. H. 34; Glocke *v.* Glocke, *supra.*

where, on the obligor's failure to support the grantor, it is presumed that he accepted the deed with the intention of not performing his contract, and this implied fraud gives equity jurisdiction to cancel the deed.[14]

The recent case of *Huffman* v. *Rickets* (Ind. App. 1916) 111 N. W. 322, in a well considered opinion containing an exhaustive review of the authorities, fortifies the rule for the protection of aged grantors. There an old woman conveyed her property to her son and his wife, on condition that they support her for life. The grantees performed until the wife died and the husband became insane. The guardian of the latter tendered performance, but the grantor refused to receive it, and sued for cancelation of the deed. The court granted her petition, decreeing an accounting for the support already given.[15] It held that such a condition required personal care and companionship which only the grantee could render, and that, consequently, the obligation was non-delegable. Though this seems a just disposition of the case, it is by no means the undisputed rule, as many courts allow one not a party to the transaction to perform the grantee's agreement.[16]

Of all the methods of treating deeds in consideration of support noted above, that which construes such deeds as given on condition subsequent protects the grantor most amply. Under this view, the grantee must perform the agreement or risk losing his estate for failure,[17] and the grantor is not left to the inadequate remedy of accepting some substitute in place of that which he intended to receive. It has been suggested that the court might better guard the rights of both parties by treating such conveyances substantially as trusts,[18] thus gaining immediate equitable jurisdiction over the cause. Then it could appoint a receiver and administer the estate of the grantee as a trust asset,[19] or it could declare the grantee trustee and order him to carry out the

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[14]Frazier *v.* Miller, *supra*; McClelland *v.* McClelland (1898) 176 Ill. 83, 51 N. E. 559; see Spangler *v.* Yarborough (1909) 23 Okla. 806, 101 Pac. 1107. Under this doctrine, however, it is obvious that when the grantee performs until death and then his infant children default, since neither fraud nor bad faith in the grantee can be implied by reason of such default, the deed cannot be canceled, though the grantor has a lien on the land for support. Stebbins *v.* Petty (1904) 209 Ill. 291, 70 N. E. 673. Assuming that the obligation is delegable, this result is logical, but it seems to protect the interests of the grantee's heirs at the expense of the grantor. See Cross *v.* Carson (Ind. 1846) 8 Blackf. *138.

[15]The general rule is that the grantee is credited in the accounting with the value of permanent improvements and support, and charged with the amount of the rental value. Grant *v.* Bell (1904) 26 R. I. 288, 58 Atl. 951. But it has been held that the grantee cannot recover for support, Morgan *v.* Loomis (1891) 78 Wis. 594, 48 N. W. 109, or even for permanent improvements. See Daniels *v.* France (Ky. 1916) 182 S. W. 919.

[16]Such contracts are personal. Glocke *v.* Glocke, *supra*; Payette *v.* Ferrier (1899) 20 Wash. 479, 55 Pac. 629; Cree *v.* Sherfy, *supra*; *contra*, Stebbins *v.* Petty, *supra*; Keister *v.* Cubine, *supra*; Webster *v.* Cadwallader, *supra*.

[17]Thomas *v.* Thomas (1893) 24 Ore. 251, 33 Pac. 565.

[18]Barnes *v.* Barnes (1892) 23 D. C. 479. "While such contracts are not often in form a trust, they are usually in fact a trust. * * * We think it is much more consonant with the principles of equity to treat this as an implied trust, renounced by the donee, than to treat it as a mere contract." Grant *v.* Bell, *supra*.

[19]Keister *v.* Cubine, *supra*.

trust, to save his estate,[20] and, if he failed to do so, it could decree a reconveyance or cancelation.[21]

EVENTS SUBSEQUENT TO THE CONTRACT AS A DEFENCE TO SPECIFIC PERFORMANCE.—The broad principle that equity, in its discretion, will deny specific performance where to grant it would impose a hardship on the defendant, appears from a consideration of the cases to resolve itself into the narrower rule that the contract will not be enforced where there is inadequacy of consideration due to the mental inferiority of the defendant; the fraud or failure of the plaintiff to disclose facts peculiarly within his knowledge, when under a duty to do so; or events subsequent to the contract which have rendered it unequal.[1] The frequent statement that the only question is whether the contract was fair and reasonable at the time when made[2] applies where specific performance will carry out the contract as originally intended by the parties, but admittedly does not preclude a defence based on subsequent events not within the contemplation of the parties when the contract was made.[3] The decisions in which such a defence has been sustained appear to rest on one or both of the following grounds: first, the fact that specific performance would impose on the defendant a burden utterly disproportionate to the benefit secured to the plaintiff;[4] and secondly, that a literal enforcement of the contract would violate the real intent of the parties.[5] That the latter is the more important element is apparent from the fact that where both are present the court prefers to rest its decision on the intent of the parties,[6] sometimes adding by way of dictum that even if the subsequent events were in the contemplation of the parties, nevertheless the

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[20]Cornell *v.* Whitney (1903) 132 Mich. 300, 93 N. W. 614.

[21]Reid *v.* Burns (1861) 13 Ohio St. 49; Grant *v.* Bell, *supra*; Cornell *v.* Whitney, *supra*; Abbott *v.* Sanders, *supra*.

[1]9 Columbia Law Rev., 68.

[2]See Prospect Park & C. I. R. R. *v.* Coney Island & B. R. R. (1894) 144 N. Y. 152, 39 N. E. 17; Willard *v.* Tayloe (1869) 75 U. S. 557.

[3]Willard *v.* Tayloe, *supra*.

[4]City of London *v.* Nash (1747) 3 Atk. 512; Kimberley *v.* Jennings (1836) 6 Sim. 340; Clarke *v.* Rochester L. & N. F. R. R. (N. Y. 1854) 18 Barb. 350. The denial of relief is frequently influenced by other equities such as laches of the plaintiff, Town of Huntington *v.* Titus (N. Y. 1900) 50 App. Div. 468, 64 N. Y. Supp. 58, or the interest of the public. Conger *v.* New York W. S. & B. R. R. (1890) 120 N. Y. 29, 23 N. E. 983. An additional ground for denying specific performance where the benefit to the plaintiff is very slight is the obvious adequacy of legal damages.

[5]King *v.* Raab (1904) 123 Iowa 632, 99 N. W. 306; Ferguson *v.* Blackwell (1899) 8 Okla. 489, 58 Pac. 647. In the leading American case, Willard *v.* Tayloe, *supra*, the contract provided for payment in "cash". Prior to the time for performance Congress declared government notes "legal tender". The court held that although government notes were "cash" at the time of the tender, the parties meant gold, and the plaintiff must pay him gold.

[6]Chicago & A. R. R. *v.* Schoeneman (1878) 90 Ill. 258; Trustees *v.* Thacher (1882) 87 N. Y. 311.

hardship to the defendant would be a defence.[7] The same test is applied in the analogous question of mutual mistake, where the expressed intent of the parties will not be enforced because it is contrary to their real intent.[8] The same considerations govern the converse of this situation, for in contracts of a speculative nature, such as mining leases, where a subsequent change in values was probably contemplated by the parties, the contract will generally be enforced,[9] be the hardship to the defendant ever so great, because the parties intended to cover such a contingency.[10]

These principles might well have been applied in the recent case of *Humpfner* v. *Beers* (App. Div., 1st Dept. 1916) 157 N. Y. Supp. 345. A tenant brought a bill for specific performance of an option to renew contained in a twenty-one year lease providing for a renewal upon the same terms and conditions as the original lease. Subsequent to his election to renew, the landlord, also owner of adjoining premises, discovered a hidden drain running from the leased premises under the adjoining lot to the street. Fearing that a renewal lease of the premises "with the appurtenances" would create an easement in view of his present knowledge of the drain, he refused to execute the lease except upon the insertion therein of a provision to the effect that the making of the lease should not create any easement unless such easement legally existed prior to the renewal. The court held for the landlord. Here, due to subsequent events, namely, the discovery of the drain, which could not possibly have been contemplated when the contract was made, the exact wording of the contract fails to express the true intent of the parties.[11] It might also be urged that a literal enforcement of the contract would work a forfeiture,[12] and as the defendant was a trustee, there was also present the equity of the *cestui*, which should be protected.[13] The court was therefore fully

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[7]Chambers *v.* Livermore (1867) 15 Mich. 381; Kelley *v.* York etc. Co. (1900) 94 Me. 374, 47 Atl. 898; Waite *v.* O'Neil (C. C. 1896) 72 Fed. 348.

[8]Reid *v.* Slocum (1904) 34 Wash. 173, 75 Pac. 629; Hatch *v.* Kizer (1892) 140 Ill. 583, 30 N. E. 605. Specific performance may be decreed if the plaintiff agrees to abatement of the price, in case of a deficiency, Leigh *v.* Crump (1840) 36 N. C. 299, or compensation, in case of a surplus. King *v.* Hamilton (1830) 29 U. S. 311. A unilateral mistake on the part of the defendant may be a defence if due to the plaintiff. Chute *v.* Quincy (1892) 156 Mass. 189, 30 N. E. 550.

[9]Haywood *v.* Cope (1858) 25 Beav. 140; Bradley *v.* Heyward (C. C. 1908) 164 Fed. 107; 9 Columbia Law Rev., 68.

[10]Franklin Tel. Co. *v.* Harrison (1892) 145 U. S. 459, 472, 473, 12 Sup. Ct. 900. In this, as in many of the later cases, the court does not recognize hardship as a possible consequence of foreseen circumstances, thus leaving the sole test one of intention.

[11]Willard *v.* Tayloe, *supra*; Waite *v.* O'Neil, *supra*. Specific performance in the principal case would give the plaintiff property which it was not intended he should have, and without compensation to the defendant. Gotthelf *v.* Stranahan (1893) 138 N. Y. 345, 34 N. E. 286.

[12]This, of course, is not a forfeiture provided for by a term of the contract, but one resulting indirectly from its enforcement. Peacock *v.* Penson (1848) 11 Beav. 355. It is no defence where brought about by the default of the defendant. Helling *v.* Lumley (1858) 3 De G. & J. 493.

[13]See Harnett *v.* Yielding (1805) 2 Sch. & Lef. *549; Tamm *v.* Lavalle (1879) 92 Ill. 263.

justified in refusing to enforce what in substance, though not in terms, is now really a different contract from that which the defendant made.[14]

Sale or Reservation of Standing Timber.—When standing timber is sold or reserved as separate from the land,[1] the contract or deed is usually absolute in its terms, but contains a stipulation that the vendee or grantor, as the case may be, must remove the wood within a certain time. In a minority of cases no mention is made of a time limit. In construing the latter class of instruments, the courts generally apply the rule that the timber must be removed within a reasonable time. It cannot be doubted that such a construction is proper in those jurisdictions where the title does not pass until an actual severance has taken place, since the contract is then an executory one for the sale of personal property.[2] But where title to the timber passes immediately, which is the usual effect of such deed or contract, it should be noticed that this rule is most often applied when it may be fairly inferred from surrounding circumstances or from the situation of the parties that a reasonable time only was intended, or when there is evidence of a parol agreement to that effect.[3] There are, however, authorities to support its enunciation as a broad rule of law, which read into the instrument the stipulation of a reasonable time, though there is nothing to show that such was the intention of the parties.[4] Though this rule may be recognized, it is possible, of course, to convey or reserve an indefeasible title by the use of

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[14]See Baxendale *v.* Seale (1855) 19 Beav. 601. A lease providing for renewal upon "the same covenants and conditions" was held not to entitle the lessee to a renewal clause in the new lease. Muhlenbrinck *v.* Pooler (N. Y. 1886) 40 Hun 526. The principal case is a proper one for partial performance, King *v.* Hamilton, *supra*, by an execution of the lease including the protecting clause, but the question of compensation would depend on a determination of the legal existence of the easement.

[1]Whether it is a sale or a reservation, the same principles are involved and the same rules should be applied. See Adkins *v.* Huff (1906) 58 W. Va. 645, 52 S. E. 773; Huron Land Co. *v.* Davison (1902) 131 Mich. 86, 90 N. W. 1034; but see Mining Co. *v.* Cotton Mills (1906) 143 N. C. 307, 55 S. E. 700.

[2]See Fletcher *v.* Livingston (1891) 153 Mass. 388, 26 N. E. 1001; Butterfield Lumber Co. *v.* Guy (1908) 92 Miss. 361, 46 So. 78. It is possible, however, to convey timber as an interest in the land in Massachusetts. White *v.* Foster (1869) 102 Mass. 375, though contracts for the sale of timber are not generally so regarded, especially when they are oral and would therefore be invalid by the Statute of Frauds. See 15 Columbia Law Rev., 465.

[3]Hicks *v.* Phillips (1912) 146 Ky. 305, 142 S. W. 394; Patterson *v.* Graham (1894) 164 Pa. 234, 30 Atl. 247; McNair etc. Co. *v.* Adams (1907) 54 Fla. 550, 45 So. 492; but see Ferguson *v.* Arthur (1901) 128 Mich. 297, 87 N. W. 259.

[4]McNair etc. Co. *v.* Parker (1912) 64 Fla. 371, 59 So. 959; Fletcher *v.* Lyon (1909) 93 Ark. 5, 123 S. W. 801; Decker *v.* Hunt (N. Y. 1906) 111 App. Div. 821, 98 N. Y. Supp. 174; McRae *v.* Stillwell (1900) 111 Ga. 65, 36 S. E. 604.

appropriate language sufficiently clear to negative any other presumption.[5]

In the recent case of *Chapman* v. *Dearman* (Tex. Civ. App. 1915) 181 S. W. 808, the plaintiff sought to restrain the defendant from cutting certain timber which the latter had conveyed to the plaintiff's assignors by a deed authorizing the grantees, "their heirs, assigns and legal representatives" to enter for the purpose of cutting and removing. It was held, one judge dissenting, that a fee simple estate in the trees was conveyed, and that title did not revert to the grantor after a reasonable time for cutting and removing had elapsed. No mention was made of extraneous circumstances that might evidence an understanding that the timber was to be removed within a reasonable time. Yet the deed did not expressly provide for a perpetual right. It must be classed, therefore with a minority of decisions expressive of what would appear to be the correct doctrine. These cases, in the absence of conditions or limitations, refuse to change the absolute terms of the deed or contract by holding that the fee in the trees is determinable upon the lapse of a reasonable time.[6]

An interesting question is raised by a consideration of the rights of the parties when the timber has not been removed within the time specified, or within the reasonable time which the court may read into the instrument.[7] It is often held that upon the expiration of such time all the rights granted or reserved are terminated and the uncut timber reverts to the owner of the soil.[8] In conflict with this view, there are cases which hold that merely the right to enter is lost thereby, and that the title to the timber is not affected.[9] The first rule may be criticised as favoring a forfeiture; nor should it be applied to vary the absolute terms of the instrument, unless it is evident that both parties contemplated a forfeiture upon failure to remove. The other holding, which destroys only the right to enter, has been regarded as anomalous and contradictory.[10] It involves the proposition that

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[5]Baker *v.* Kenney (1910) 145 Iowa 638, 124 N. W. 901; Lodwick Lumber Co. *v.* Taylor (1906) 100 Tex. 270, 98 S. W. 238; Baxter *v.* Mattox (1898) 106 Ga. 344, 32 S. E. 94; see Goodyear *v.* Vosburgh (N. Y. 1869) 57 Barb. 243; but see Fletcher *v.* Lyon, *supra.*

[6]Cobban Realty Co. *v.* Donlan (Mont. 1915) 149 Pac. 484; Magnetic Ore Co. *v.* Marbury Lumber Co. (1894) 104 Ala. 465, 16 So. 632; Butterfield Lumber Co. *v.* Guy, *supra.*

[7]The same question arises in both classes of cases. Zimmerman Mfg. Co. *v.* Daffin (1906) 149 Ala. 380, 42 So. 858.

[8]Wright *v.* Camp Mfg. Co. (1910) 110 Va. 678, 66 S. E. 843; Liston *v.* Chapman, etc. Co. (1905) 77 Ark. 116, 91 S. W. 27; Decker *v.* Hunt, *supra*; see Carson *v.* Three States Lumber Co. (1902) 108 Tenn. 681, 69 S. W. 320. The timber cut, but not removed, within the time specified, is sometimes regarded as sufficiently removed to satisfy the condition. Macomber *v.* Detroit etc. Co. (1896) 108 Mich. 491, 66 N. W. 376; *contra,* Clark *v.* Ingram-Day Lumber Co. (1907) 90 Miss. 479, 43 So. 813; see Irons *v.* Webb (1879) 41 N. J. L. 203, 207.

[9]Hoit *v.* Stratton (1873) 54 N. H. 109; Peirce *v.* Finerty (1911) 76 N. H. 38, 76 Atl. 194; Goodson *v.* Stewart (1908) 154 Ala. 660, 46 So. 239; see Keystone Co. *v.* Brooks (1909) 65 W. Va. 512, 64 S. E. 614. The time stipulated may be treated as a convenant, rather than a condition. See Zimmerman Mfg. Co. *v.* Daffin, *supra*; Keystone Co. *v.* Brooks, *supra.*

[10]Liston *v.* Chapman etc. Co., *supra*; King v. Merriman (1887) 38 Minn 47, 35 N. W. 570.

the owner of the timber no longer has any legal right to go upon the other's land, but that he may enter and remove the timber, subject to the payment of damages for the trespass only.[11] Though such trespasses might have to be frequent, a court of equity, in the absence of any other injury to the premises, would probably not enjoin the owner of the timber from taking possession of his own property.[12] Under certain circumstances, it might even restrain the landowner from resisting such entry. As another way out of the difficulty, where the vendee is held to have acquired an interest in the land, equity might entertain a partition suit by either party.[13]

THE SITUS OF CHOSES IN ACTION.—A chose in action, being an incorporeal, intangible thing, can have no actual, physical *situs*.[1] As a matter of practice, however, in determining the rights of parties laying claim to a chose in action, it is frequently necessary to assign it some legal *situs*. Accordingly it is often said that its *situs* is generally at the domicil or with the person of the creditor.[2] On the other hand, for certain purposes, such as taxation,[3] administration of estates,[4] and trustee process,[5] the *situs* is commonly fixed at the domicil or with the person of the debtor. This departure from what is considered the general rule is usually accounted for on the theory of a legislative or judicial fiat.[6] In the case of garnishment it has also been said that jurisdiction does not depend on the *situs* of the debt but upon control over the garnishee properly served.[7] It is submitted that a more satisfactory explanation, however, may be found which will cover all the so-called anomalous cases without resort to a legal fiction.

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[11]Goodson *v.* Stewart, *supra.*

[12]See Gates *v.* Johnston Lumber Co. (1899) 172 Mass. 495, 52 N. E. 736.

[13]See Butterfield Lumber Co. *v.* Guy, *supra.*

[1]See Chicago etc. Ry. *v.* Sturm (1898) 174 U. S. 710.

[2]See Lovejoy *v.* Albee (1851) 33 Me. 414, 417; Williams *v.* Ingersoll (1882) 89 N. Y. 508, 523; Lancashire Ins. Co. *v.* Corbetts (1897) 165 Ill. 592, 46 N. E. 631; Morgan *v.* Mutual etc. Ins. Co. (N. Y. 1907) 119 App. Div. 645, 104 N. Y. Supp. 185.

[3]See 16 Columbia Law Rev., 137.

[4]Saunders *v.* Weston (1882) 74 Me. 85; *cf.* Merrill *v.* New England etc. Ins. Co. (1869) 103 Mass. 245.

[5]See *infra,* notes 6, 7, 9.

[6]Bragg *v.* Gaynor (1893) 85 Wis. 468, 55 N. W. 919; Newland *v.* Reilly (1891) 85 Mich. 151, 48 N. W. 544; Williams *v.* Ingersoll, *supra.* Where the authority for fixing the *situs* with the debtor is regarded as purely statutory and in derogation of the common law rule, it naturally follows that the statutes governing must be strictly followed. Morawetz *v.* Sun Ins. Co. (1897) 96 Wis. 175, 71 N. W. 109. On the point made in the Morawetz Case that the corporation must have property in the state or be liable on a cause of action arising either in the state or in favor of a resident thereof, see *contra* Newland *v.* Reilly, *supra*; Miller *v.* Jones (N. Y. 1893) 67 Hun 281, 22 N. Y. Supp. 86. Where the garnishee and principal debtor reside in different states having different exemption laws the *lex fori* should apply. Morgan *v.* Neville (1873) 74 Pa. 52; *contra,* Mason *v.* Beebee (1890) 44 Fed. 556.

[7]See Mooney *v.* Buford etc. Co. (1896) 72 Fed. 32; Lancashire Ins. Co. *v.* Corbetts, *supra.*

If we may assume that a chose in action connotes a right to sue at law for a recovery against the obligor, then it may well be said that the *situs* of the chose in action will be wherever that right exists; and, since the obligor generally may be sued wherever he is found, it will follow that the *situs* is with his person. There should be no more difficulty with the conception of a man in one state owning a chose in action the *situs* of which is in another state than with the conception of his owning land or chattels similarly situated. Nor does the possession in one state of a promissory note, stock certificate, or other evidence of an obligation, the *situs* of which is in another state, present any greater inconsistency than the case of a deed or bill of sale in one state as evidence of title to property situated in another. In short, the logical rule would seem to be that a chose in action is property[8] whose *situs* is with the person of the debtor or obligor. Where the obligor is a corporation doing business in several states and having in such states duly accredited agents upon whom process may be served, it is well settled that suit may be brought against it in any state where it is so represented.[9]

These principles were applied in the recent case of *Perry* v. *Young* (Tenn. 1916) 118 S. W. 577. The complainant had caused to be issued to him by an insurance company incorporated under the laws of New Jersey a policy of insurance on his life, payable to himself, and had assigned this policy to his mother. After the death of the mother, the insured brought a bill to reform the contract of assignment to conform to the alleged agreement that the policy should revert to him in case his mother first died. Certain non-resident distributees of the mother were served by publication. It was admitted that the court had full statutory power to render a decree *in rem* affecting property properly brought within its control and that service by publication in such a proceeding would be valid,[10] so that the real question was whether the claim under the policy, the chose in action against the insurance company, was property within the jurisdiction of the court. The court held that it was and that, having jurisdiction over this *res* by virtue of service on the company through its Tennessee agent, it

[8]Bragg *v* .Gaynor, *supra*; see Morgan *v.* Mutual etc. Ins. Co., *supra*; *cf.* Ryan *v.* Seaboard R. R. (1897) 83 Fed. 889.

[9]Mohr etc. Co. *v.* Ins. Co. (1882) 12 Fed. 474; Hannibal & St. Joseph R. R. *v.* Crane (1882) 102 Ill. 249; Mooney *v.* Buford etc. Co., *supra.* And it has been held that an agreement to waive the right to sue the corporation wherever found is void. Reichard *v.* Manhattan Life Ins. Co. (1862) 31 Mo. 518. Where actions are brought in different states on the same claim, the general rule is that the judgment first paid will bar the enforcement of other judgments in other states. See Lancashire Ins. Co. *v.* Corbetts, *supra*; but see Bryan *v.* University Publishing Co. (1889) 112 N. Y. 382, 19 N. E. 825; Douglass *v.* Phenix Life Ins. Co. (1893) 138 N. Y. 209, 33 N. E. 938; *cf.* Morgan *v.* Mutual etc. Ins. Co., *supra.*

[10]Although it is well recognized that a personal judgment against a non-resident served by publication or other substituted process is invalid, Pennoyer *v.* Neff (1877) 95 U. S. 714; McEwan *v.* Zimmer (1878) 38 Mich. 765; Shepard *v.* Wright (N. Y. 1880) 59 How. Pr. 512, it is equally well settled that, where the court has within its jurisdiction property of a non-resident, it may, under any authorized form of substituted service upon such defendant, render a judgment *in rem* or *quasi in rem* affecting the status of such property or title thereto. Cooper *v.* Reynolds (1870) 77 U. S. 308; Lockwood *v.* Brantly (N. Y. 1883) 31 Hun 155; Sohege *v.* Singer Mfg. Co. (1907) 73 N. J. Eq. 567, 68 Atl. 64; see Pennoyer *v.* Neff, *supra.*

could settle the status and rights of the parties with respect to the policy. Not only is this decision correct under the principles above set forth,[11] but if the *situs* of a chose in action be deemed to be with the creditor it is difficult to see how any adjudication could ever be obtained upon a state of facts such as are presented in that case where the parties claiming are residents of different states.[12] The same inconvenience would also arise if there were but one person claiming adversely to the plaintiff and that person resided in a state where the insurance company had no duly accredited agent. The decision in the principal case, therefore, is a commendable one both logically and on the ground of expediency.

NATURE AND EXTENT OF THE RIGHT IN TRADE-MARKS.—"A trade-mark is an arbitrary, distinctive name symbol or device to indicate or authenticate the origin of the product to which it is attached."[1] For the acquisition of a right in such a mark, there must be, in addition to invention, such use in connection with a particular product as will identify the origin of that product among others of the same class.[2] Once the right is acquired, however, mere use of the distinctive symbol by another amounts to a misrepresentation that his goods are those of the owner of the trade-mark. This misrepresentation constitutes the ultimate offense in cases of trade-mark infringement[3] and is an actionable wrong regardless of intent.[4] This fact, that even innocent use will constitute an infringement, has resulted in the classification of the right in a technical trade-mark as a property right,

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[11]But see Jellenik *v.* Huron Copper Mining Co. (1897) 82 Fed. 778; Gleason *v.* Northwestern etc. Ins. Co. (1911) 203 N. Y. 507, 97 N. E. 35.

[12]See Morgan *v.* Mutual etc. Ins. Co., *supra*, p. 653.

[1]G. W. Cole Co. *v.* American Cement & Oil Co. (C. C. A. 7th 1904) 130 Fed. 703, 705; see Ball *v.* Broadway Bazaar (1909) 194 N. Y. 429, 434, 87 N. E. 674. This definition serves to distinguish a technical trade-mark from a trade name which does not of itself point to the origin of the goods but may do so by an acquired secondary meaning which will be protected on the doctrine of unfair competition. G. W. Cole Co. *v.* American Cement & Oil Co., *supra*; Waltham Watch Co. *v.* American Waltham Watch Co. (1899) 173 Mass. 85, 53 N. E. 141; Draper *v.* Skerrett (C. C. 1902) 116 Fed. 206.

[2]Tetlow *v.* Tappan (C. C. 1898) 85 Fed. 774; Derringer *v.* Plate (1865) 29 Cal. 293, 295; see G. & C. Merriam Co. *v.* Saalfield (C. C. A. 6th 1912) 198 Fed. 369, 372.

[3]McLean *v.* Fleming (1877) 96 U. S. 245, 255; Church & Dwight Co. *v.* Russ (C. C. 1900) 99 Fed. 276; see Canal Co. *v.* Clark (1871) 80 U. S. 311, 322. The injury to the right in a trade name is in its essence the same. Bissel Chilled Plow Works *v.* T. M. Bissel Plow Co. (C. C. 1902) 121 Fed. 357. In fact, both classes of cases are simply branches of the law of unfair competition, see G. & C. Merriam Co. *v.* Saalfield, *supra*, and the underlying principle is to afford protection to the good will of a business. See McLean *v.* Fleming, *supra*.

[4]Church & Dwight Co. *v.* Russ, *supra*; Coffeen *v.* Brunton (1849) 4 McLean 516; see Lawrence Mfg. Co. *v.* Tennessee Mfg. Co. (1891) 138 U. S. 537, 549, 11 Sup. Ct. 396. In the last case, it is indicated that rebuttal of the presumption of fraudulent intent would result in exemption from liability for damages, leaving the plaintiff to an injunction only. *Cf.* McLean *v.* Fleming, *supra*, p. 257.

which will be afforded unlimited protection as such.[5] The result of the protection given by the courts undoubtedly is to create rights which are for many purposes the same as those in property.[6] Yet a trade-mark is not, strictly speaking, property, except as it is an accessory to an established business.[7] The better supported view is that, however the right be classified,[8] the ground on which jurisdiction is assumed is not the protection of the right itself, but rather protection against injury to a business by false representation of wares by the misappropriation of a trade-mark.[9] In support of this latter view, the Supreme Court has lately held in *Allen & Wheeler Co.* v. *Hanover Star Milling Co.* (U. S. Sup. Ct., Oct. Term 1915, No. 30, March 6, 1916), that protection will not be afforded a trade-mark beyond the territory in which it has become known to the public by the extension of the owner's trade.[10]

It is possible that, even assuming an absolute right of property in the junior appropriator, the result of the principal case may be reached on the ground that use of another's trade-mark in a locality where the goods of the first user of the trade-mark are unknown, does not amount to a misrepresentation; does not in short, constitute an injury. Or again, granting a technical injury by such use, the plaintiff very possibly may be unable to show actual damage, and equity may well leave him to his action at law for nominal damages until, having extended his trade, he can show such irreparable injury as would be a ground for injunctive relief. In brief, the determination of the extent of the right in question appears to turn rather on the nature of the violation of the right than on the nature of the right itself. If the law of trade-marks and that of trade names[11] are both merely branches of the broader law of unfair competition,[12] and the essence of the injury is the same in both cases, then the rule of territorial limitation applied in the one class of cases is rightly applied to the other as in the principal case. To hold otherwise is to protect the good will of a business beyond the limits to which the industry of the owner has extended it.

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[5]Derringer *v.* Plate, *supra*; see Hopkins, Unfair Trade, 8, 10; Trade-Mark Cases (1879) 100 U. S. 82, 92. In cases of trade names, on the other hand, protection will not be granted beyond the locality in which the name has acquired a secondary meaning. Cohen *v.* Nagle (1904) 190 Mass. 4, 76 N. E. 276.

[6]A trade-mark may be sold as part of an established business, Leather Cloth Co. *v.* American Leather Cloth Co. (1865) 11 H. L. Cas. 522, and a right to use it will pass to one receiving exclusive sales rights in a particular territory from the owner of the business. Fred Gretsch Mfg. Co. *v.* Schoening. (D. C. S. D. N. Y. 1916) 54 N. Y. L. J. 2405.

[7]It is analogous to the good will of a business, in that it cannot be assigned apart from the business. Bulte *v.* Igleheart Bros. (C. C. A. 7th 1905) 137 Fed. 492, 498.

[8]For a statement that there is no property right whatever in a trade-mark, see for example Collins Co. *v.* Brown (1857) 3 Kay & J. 423, 426.

[9]Perry *v.* Truefitt (1842) 6 Beav. 66; Ainsworth *v.* Walmsley (1866) L. R. 1 Eq. Cas. 518, 524; Chadwick *v.* Covell (1890) 151 Mass. 190; see Lee *v.* Haley (1869) 39 L. J. [N. S.] 284, 286.

[10]Theodore Rectanus Co. *v.* United Drug Co. (C. C. A. 6th 1915) 226 Fed. 545, *accord*, resting its decision on the ground of estoppel. It is difficult to see how the grounds of an estoppel can be found in such a case where neither party knew of the use by the other.

[11]See note 1, *supra*.

[12]See note 3, *supra*.

RECENT DECISIONS.

ROBERT H. FREEMAN, *Editor-in-Charge.*
VERMONT HATCH, *Associate Editor.*

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS—VALIDITY—HINDERING AND DELAYING CREDITORS.—An insolvent debtor, acting in good faith, assigned all his property to the plaintiff for the benefit of his creditors, without restriction or preference. The plaintiff now sues to recover such of the property as was thereafter seized by the defendant in execution of a judgment against the debtor. *Held,* the plaintiff may recover. *Sabin* v. *Chrisman* (Ore. 1916) 154 Pac. 908.

In the absence of fraud, the law views with favor a voluntary assignment of the insolvent debtor's entire property for the benefit of all his creditors, see *Malcolm* v. *Hall* (Md. 1850) 9 Gill 177; *Mayer* v. *Hellman* (1875) 91 U. S. 496, and such assignments are valid even where made for debts due only in equity and good conscience. *Durant* v. *Pierson* (1891) 124 N. Y. 444, 26 N. E. 1095; *cf. Wilson* v. *Russell* (1858) 13 Md. 494, 528. Although, in the absence of statutory prohibition, the debtor is generally permitted to make preferences in his assignment, *Blair* v. *Illinois Steel Co.* (1896) 159 Ill. 350, 362, 42 N. E. 895; *Means* v. *Montgomery* (1884) 23 Fed. 421, they are tolerated rather than encouraged. See *Turnipseed* v. *Schaefer* (1886) 76 Ga. 109. The assent of the creditors is necessary to make the assignment valid against subsequent attachment, *Faulkner* v. *Hyman* (1886) 142 Mass. 53, 6 N. E. 846; see *Smith* v. *Millet* (1877) 11 R. I. 528, but such assent is presumed unless there is evidence to the contrary, if the assignment is beneficial to the creditors. See *Ewing* v. *Walker* (1895) 60 Ark. 503, 31 S. W. 45; *Fearey* v. *O'Neill* (1899) 149 Mo. 467, 50 S. W. 918. If the assignment is made with intent to hinder, delay and defraud creditors, it is void by the Statute of Fraudulent Conveyances, 13 Eliz. c. 5, which has passed with the common law into all our states. Glenn, Creditors' Rights and Remedies, §§ 68-70. It is fraudulent *per se* if the debtor demands of the creditors a release of all debts as a condition to participating in the assignment, see 14 Columbia Law Rev., 528, or reserves some benefit to himself. *Montgomery* v. *Goodbar & Co.* (1891) 69 Miss. 333, 13 So. 624. But where, as in the principal case, the debtor in good faith assigns all his property without reservation or preference for the benefit of all his creditors, the assignment is valid even though the necessary result is to hinder and delay creditors in enforcing their claims through an action at law. *Hoffman, Burneston & Co.* v. *Mackall* (1855) 5 Ohio St. 124; 1 Freeman, Executions (3rd ed.) § 146.

ATTACHMENT—DEATH OF DEFENDANT—EFFECT.—The widow and heirs-at-law of an intestate whose real property was attached in his lifetime claim that the attachment was dissolved by his death. *Held,* under the Iowa statutes providing that actions shall survive the death of the defendant, the attachment was not dissolved thereby. *Tetzloff* v. *May* (Iowa 1915) 154 N. W. 905.

At common law, when the death of the defendant before judgment abated an action, it also dissolved attachments incidental thereto, *Reynolds* v. *Nesbitt* (1900) 196 Pa. 636, 46 Atl. 841; *Sweringen* v. *Admr. of Eberius* (1842) 7 Mo. 421; *Dwyer* v.

Benedict (1879) 12 R. I. 459,—a rule that applied also to corporations defendant which became civilly dead by dissolution while the action was pending; *Farmers' & Mechanics' Bank* v. *Little* (Pa. 1844) 8 Watts & Serg. 207, 220; see *Morgan* v. *New York Nat. Bldg. & Loan Assn.* (1900) 73 Conn. 151, 46 N. E. 877; but the death of the defendant after judgment, though before execution, had no effect on the attachment. *Fitch* v. *Ross* (Pa. 1818) 4 Serg. & Raw. *557; see *Cunningham* v. *Burk* (1885) 45 Ark. 267. Where, however, the action may be continued against the personal representative of the defendant, it has been held that the attachment is dissolved as to realty, since, if a judgment were obtained, it would be against the executor or administrator and could not be satisfied out of the real estate attached unless it were shown that the personalty was insufficient. *Phillips* v. *Ash's Heirs & Admrs.* (1879) 63 Ala. 414; *Vaughn* v. *Sturtevant* (1863) 7 R. I. 372; but see *Perkins' Heirs* v. *Norvell* (1845) 25 Tenn. 151. But in some jurisdictions the statutes as to the survival of actions are so liberal as impliedly to justify the continuance of the attachment, *Don* v. *Blake* (1893) 148 Ill. 76, 89, 35 N. E. 761, in which case the execution may be satisfied directly out of the property attached. *Mitchell* v. *Schoonover* (1888) 16 Ore. 211; *Frellson* v. *Green* (1858) 19 Ark. *376. Although the question has apparently not come before the New York Court of Appeals, it has been held in the Supreme Court that what is now § 416 Code Civ. Proc., giving the court jurisdiction and control of all the subsequent proceedings in an action from the time of granting a provisional remedy, taken in connection with what is now § 757, providing for continuance of action after death of a party by or against his personal representative, preserves the attachment after the death of the defendant. *Thacher* v. *Bancroft* (N. Y. 1862) 15 Abb. Prac. 243; *More* v. *Thayer* (N. Y. 1850) 10 Barb. 258; *cf.* dissenting opinion in *Aetna Nat. Bank* v. *Kramer* (1911) 142 App. Div. 444, 447, 126 N. Y. Supp. 970.

Carriers—Limitation of Liability—Theft by Employee.—The plaintiff shipped goods under a bill of lading which provided that unless a greater value was declared, and a correspondingly higher rate paid, the company should not be liable for more than $50.00 in any event. The goods were stolen by an employee of the carrier and the plaintiff brought suit for the full value. *Held,* the limitation of liability extends to such a case and the company is only liable to the extent of $50.00, the plaintiff not having declared a greater value. *D'Utassy* v. *Barret* (App. Div., 1st Dept., 1916) 157 N. Y. Supp. 916.

Stipulations as to the value of property in a contract of shipment, if fairly made, and in consideration of a lower rate, preclude the shipper from showing that the actual value of the article shipped was greater than that declared at the time of fixing the rate for carriage. *Hart* v. *Pennsylvania R. R.* (1884) 112 U. S. 331, 340, 5 Sup. Ct. 151, 155; *Adams Exp. Co.* v. *Croninger* (1913) 226 U. S. 491, 33 Sup. Ct. 148. This limitation of responsibility, however, can not be invoked by the carrier where it has misdelivered, converted to its own use, or carried the property over the wrong route. *Southern Ry.* v. *Webb* (1905) 143 Ala. 304, 39 So. 262; *Shelton* v. *Canadian Northern Ry.* (C. C. 1911) 189 Fed. 153; *cf. Sleat V. Fagg* (1822) 5 Barn. & Ald. 342; Hutchinson, Carriers (3rd ed.) 518 n. 23, § 480. Some courts have reached a conclusion contrary to the holding in the principal case on the ground that a limitation protecting against the theft or

conversion by the carrier's servants would be against public policy. *Adams Exp. Co.* v. *Berry & Whitmore Co.* (1910) 35 App. D. C. 208; see *The New England* (D. C. 1901) 110 Fed. 415; *cf. Southern Exp. Co.* v. *Gutman* (1885) 6 Ky. L. Rep. 587; s. c., *ibid,* 654. As the liability in such a case would not seem to be based on the law of agency, but on the extraordinary liability imposed on carriers, there seems to be no infraction of any rule or policy in allowing the carrier the benefit of the stipulation.

Carriers—When Liability as Warehouseman Begins.—The plaintiff shipped a carload of onions over the defendant's railroad and drew a sight draft with bill of lading attached upon intended purchaser, retaining title in himself as shipper and consignee. Delivery to the purchaser was not effected nor was the shipper notified until fourteen days after the arrival of the goods, although by a local custom defendant should have notified plaintiff of failure to deliver within forty-eight hours after arrival. *Held,* the defendant, not having assumed the position of warehouseman, remained liable as carrier. *South Deerfield Onion Storage Co.* v. *New York, N. H. & H. R. R.* (Mass. 1916) 111 N. E. 367.

There is an irreconcilable conflict among authorities as to when a carrier's liability in respect to goods awaiting delivery is reduced to that of warehouseman. In some jurisdictions the liability of a common carrier as carrier ends when the consignee has had a reasonable opportunity to remove the goods, he being presumed to know the time of their arrival. *Moses* v. *Boston & Me. R. R.* (1856) 32 N. H. 523; see *Backhous* v. *Chicago & N. W. Ry.* (1896) 92 Wis. 393, 66 N. W. 400. The rule representing the weight of authority, however, is that the carrier must give such notice as is practicable to the consignee of the arrival of the goods and allow a reasonable time thereafter for removal. *Fenner* v. *Buffalo & St. L. R. R.* (1871) 44 N. Y. 505; *Railroad Co.* v. *Hatch* (1895) 52 Ohio 408. In a few jurisdictions, including that of the principal case, as soon as the goods have arrived at their destination and have been unloaded the duty as carrier ends, *Rice* v. *Hart* (1875) 118 Mass. 201; *Almand* v. *Georgia R. R. & Banking Co.* (1895) 95 Ga. 775, 21 S. E. 674, except where there has been a delay in their arrival, in which case the Missouri courts hold that the consignee is entitled to notice. *Frank* v. *Grand Tower & C. Ry.* (1894) 57 Mo. App. 181. A duty on the part of the carrier to give notice to the consignee or shipper may be imposed by contract between the parties, or by a usage or custom at the place of delivery. 4 Elliott, Railroads (2nd ed.) 264; Lawson, Usages and Customs § 96; *Almand* v. *Georgia R. R. & Banking Co., supra.* Since in the principal case a custom was proved whereby plaintiff was entitled to notice within forty-eight hours, which was not given, it would seem that the court was correct in holding the carrier liable as insurer.

Choses in Action—Insurance Policy—Situs.—Complainant took out a policy of insurance on his life and assigned the same to his mother. After the death of his mother he brought a bill to reform the assignment as indorsed on the policy, claiming that the actual agreement was that in case his mother predeceased him, the policy was to revert to him. Non-resident distributees of the mother were served by publication. *Held,* two justices dissenting, the proceedings were *quasi in rem,* the *res* being the claim against the insurance company; by having

the insurance company before it through service on its accredited agent in the state, the court had control of the *res* and could, therefore, settle the status and rights of the parties with respect to the policy, and the substituted service on non-resident defendants was valid and sufficient notice of the nature of the suit. *Perry* v. *Young* (Tenn. 1916) 118 S. W. 577. See Notes, p. 414.

Confessions—Admissibility—Plea of Guilty.—An information was filed against the defendant for assault with intent to kill. The accused entered a plea of guilty to the information, which plea was later withdrawn by leave of the court, and a plea of not guilty entered. Upon the trial of the defendant on the same information the state was permitted to prove from the record the former plea of guilty. *Held,* no error. *State* v. *Carta* (Conn. 1916) 96 Atl. 411.

The admission in evidence of a former plea of guilty before a committing magistrate is generally upheld on the ground that it is a voluntary confession. *State* v. *Blay* (1904) 77 Vt. 56, 58 Atl. 794; *State* v. *Hand* (1904) 71 N. J. L. 137, 58 Atl. 641; *Rice* v. *State* (1887) 22 Tex. App. 654, 3 S. W. 791. It is not material that the magistrate receiving the plea of guilty omitted to caution the accused or advise him of his rights, *State* v. *Hand, supra*; see *State* v. *Briggs* (1886) 68 Iowa 416, 27 N. W. 358; but see *McNish* v. *State* (1903) 45 Fla. 83, 34 So. 219; *cf. Green* v. *State* (1898) 40 Fla. 474, 24 So. 537, or that the justice had no power to receive the plea, *People* v. *Gould* (1888) 70 Mich. 240, 38 N. W. 232, or even that no formal plea is required to a preliminary information. *State* v. *Briggs, supra.* Where the court in its discretion refuses to receive a plea of guilty or a special plea in bar, that plea cannot afterwards be used as evidence against the prisoner. *Commonwealth* v. *Lannan* (1866) 95 Mass. 563; *State* v. *Meyers* (1889) 99 Mo. 107, 12 S. W. 516; *cf. Abrams* v. *State* (1904) 121 Ga. 170, 48 S. E. 965. At least one jurisdiction has taken the view, which finds strong support in the dissenting opinion in the principal case, that when the court, in its discretion, permits the withdrawal of a plea of guilty, the case stands as though that plea had never been entered and it can never be used against the defendant; *People* v. *Ryan* (1890) 82 Cal. 617, 23 Pac. 121; see Wharton, Criminal Evidence (10th ed.) § 638; but by the weight of authority the plea may be admitted either on the trial of the indictment to which the defendant, as in the principal case, has entered a plea of guilty and later withdrawn it by leave of the court, *State* v. *Bringgold* (1905) 40 Wash. 12, 82 Pac. 132, or upon a retrial after a reversal of a former conviction. *Commonwealth* v. *Ervine* (1889) 38 Ky. 30. The plea is not conclusive, and it is always open to the defendant to show that though he pleaded guilty, he was not so in fact. *Murmutt* v. *State* (Tex. 1902) 67 S. W. 508.

Corporations—De Facto Directors—Rights Against Rival Claimants.—In the name of the corporation one board of directors sued another in tort for alleged misuse of corporate property. The persons bringing the suit, whose authority to represent the corporation was denied by the defendants, relied upon their positions as *de facto* directors. *Held,* the doctrine of *de facto* corporate officers does not apply between rival claimants for the office. *Stratton-Massachusetts Gold Mines Co.* v. *Davis* (Mass. 1916) 111 N. E. 375. See Notes, p. 404.

CORPORATIONS — FOREIGN CORPORATIONS — SERVICE OF SUMMONS — DUE PROCESS OF LAW.—A summons in an action against a foreign corporation having no property or office within the state was served upon its president, who was not in the state on any business of the corporation. *Held,* not due process under the Fourteenth Amendment to the Constitution of the United States and therefore void. *Magnola Metal Co.* v. *Savannah Supply Co.* (Sup. Ct. 1915) 157 N. Y. Supp. 355.

In this case the New York Supreme Court follows the decision of the Supreme Court of the United States in *Riverside & Dan River Cotton Mills* v. *Menefee* (1915) 237 U. S. 189, 35 Sup. Ct. 579, holding such service, though made pursuant to the statute of the state, an infringement of the constitutional guaranties of due process of law, and in effect overruling the cases in the New York Court of Appeals from *Pope* v. *Terre Haute Car Mfg. Co.* (1881) 87 N. Y. 137 to *Sadler* v. *Boston & Bolivia Rubber Co.* (1911) 202 N. Y. 547, (affirming without opinion the decision in 140 App. Div. 367, 125 N. Y. Supp. 405), in which such service was upheld, despite the existing federal authority to the contrary. For a discussion of the principle involved see 7 Columbia Law Rev., 285.

COVENANTS—WARRANTY AGAINST INCUMBRANCES—RELEVY OF ASSESSMENTS.—The defendant's land was assessed for betterments. Prior to its sale to the plaintiff, the assessment was declared void. After the sale the assessment was relevied. *Held,* the defendant was not liable on his warranty against incumbrances, since mere liability to an assessment was not an incumbrance, within the meaning of the covenant, and the lien of the reassessment did not relate back to the date of the original assessment. *Armstrong* v. *Banking Trust Co.* (Kan. 1915) 153 Pac. 507.

Many jurisdictions, including Kansas, refuse to consider an assessment as an incumbrance until it becomes a lien. *Tull* v. *Royston* (1883) 30 Kan. 617, 2 Pac. 866; *Everett* v. *Marston* (1905) 186 Mo. 587, 85 S. W. 540; *Real Estate Corp.* v. *Harper* (1903) 174 N. Y. 123, 66 N. E. 660; but see *Doonan* v. *Killilea* (1914) 87 Misc. 427, 149 N. Y. Supp. 832. This rule offers an easy and practical test; but the contrary theory that "incumbrance" has a broader meaning than "lien", and that liability of property to assessment for improvements ordered or completed constitutes an incumbrance, before any lien attaches, perhaps more nearly carries out the intention of the parties. *Lafferty* v. *Milligan* (1895) 165 Pa. 534, 30 Atl. 1030; *Green* v. *Tidball* (1901) 26 Wash. 338, 67 Pac. 84, overruled by *Flajole* v. *Schulze* (1914) 80 Wash. 483, 141 Pac. 1026. The time when the lien attaches is usually fixed by statute. See *Pierse* v. *Bronnonenberg* (1907) 40 Ind. App. 662, 82 N. E. 126, and cases cited *supra.* Even assuming that mere liability to assessment does not violate the covenant, the better view is that, on reassessment, the lien relates back to the original levy, *Cadmus* v. *Fagan* (1885) 47 N. J. L. 549, unless the relevy is made under a statute enacted subsequently to the conveyance. *Maloy* v. *Holl* (1906) 190 Mass. 277, 76 N. E. 452; *cf. Barth* v. *Ward* (1901) 63 App. Div. 193, 71 N. Y. Supp. 340.

CRIMINAL LAW—BURGLARY—BREAKING OUT OF A BUILDING—NEW YORK PENAL LAW § 404 (2).—The defendant entered a building through an open door, closed it, re-opened it after committing a crime within the building and escaped through the doorway. *Held,* the defendant is

guilty of statutory burglary. *People* v. *Toland* (1916) 217 N. Y. 187, 111 N. E. 760, reversing S. C. (1915) 165 App. Div. 795, 151 N. Y. Supp. 482.

The Appellate Division laid down a very artificial test, whereby the commission by the defendant of a technical "breaking", by opening a door for purposes of exit, depended upon the agency by which the door had been closed originally. The Court of Appeals, by reversing the lower court, adopts a rule which seems to be more sound logically and better calculated to further public safety. For it seems immaterial by whom a door is closed provided it be opened by the defendant. For a criticism of the decision of the Appellate Division see 15 Columbia Law Rev., 358.

Criminal Law — Evidence — Presumption — Failure of Accused to Testify.—The New York Code Crim. Proc. § 393 declares that the defendant may testify at his trial, but that his neglect or refusal to do so does not create any presumption against him. *Held,* improper comment by the prosecutor on the defendant's failure to testify furnishes no ground for a new trial, since the jury were instructed to disregard such comment and failure, and since it appears that the guilt of the accused was reasonably certain and his rights were not seriously invaded. *People* v. *Watson* (1916) 216 N. Y. 565, 111 N. E. 243.

A witness may refuse to testify to any facts which will tend to criminate him, but this refusal must be made at the beginning, and if he answers any questions, he is liable to be fully examined and cross-examined as to the crime charged. *Commonwealth* v. *Nichols* (1873) 114 Mass. 285. At common law a person accused of crime could not testify on his trial, *Delooliery* v. *State* (1867) 27 Ind. 521, but in all States except Georgia, statutes allowing the defendant to testify have been passed, not with the idea of protecting or assisting criminals, but to promote the discovery of truth so far as can be done without infringing the constitutional rights of the accused. See *Commonwealth* v. *Nichols, supra.* In the majority of these States, the enabling act provides that no presumption whatever shall arise from the failure of the defendant to testify. *State* v. *Cameron* (1868) 40 Vt. 555; *McCoy* v. *State* (Tex. Crim. App. 1904) 81 S. W. 46; *State* v. *Goff* (1899) 10 Kan. App. 286, 61 Pac. 680; *United States* v. *Pendergast* (C. C. 1887) 32 Fed. 198. Independently of such provisions, the courts should hold that no inference is to be drawn from such omission, as otherwise the constitutional principle that no man shall be compelled to testify against himself would have practically no effect. *Commonwealth* v. *Scott* (1877) 123 Mass. 239; see *Ruloff* v. *People* (1871) 45 N. Y. 213; *contra, State* v. *Cleaves* (1871) 59 Me. 298. But the principal case is in accord with the sound rule of practice that when the prosecutor has wrongfully commented on the defendant's silence and the court has ordered that the remarks be disregarded and instructed the jury on the law as to the silence of the accused, the error is cured and a new trial need not be granted. *People* v. *Hess* (1891) 85 Mich. 128, 48 N. W. 181; *Ruloff* v. *People, supra; State* v. *Howard* (1891) 35 S. C. 197, 14 S. E. 481.

Deeds—Cancelation—Breach of Condition of Support.—Plaintiff conveyed land to her son and his wife in return for their agreement to support her for life. The wife died and the son became insane.

Plaintiff, after rejecting the tender of performance made by the committee of the son, sued for cancelation on the ground of breach of condition subsequent. *Held,* the contract of the grantees was personal and non-assignable and plaintiff was entitled to cancelation. *Huffman* v. *Rickets* (Ind. App. 1916) 111 N. E. 322. See Notes, p. 407.

DIVORCE—COLLUSION—VACATION OF DECREE.—The plaintiff, under an agreement with her husband, obtained a divorce from him in the mistaken belief that this was necessary to enable her to testify for him in a criminal action. It was further agreed that the husband was to remarry the plaintiff after the termination of the criminal proceedings. The husband, however, married another woman, and the plaintiff seeks to have the decree of divorce set aside. *Held,* the plaintiff, because of her collusion, cannot question the decree. *Henderson* v. *Henderson* (N. D. 1916) 156 N. W. 245.

It is generally recognized that where a judgment or decree of divorce is procured by fraud it may be set aside. *Olmstead* v. *Olmstead* (1889) 41 Minn. 297, 43 N. W. 67. But delay may constitute such laches as will deprive the applicant of the right to have the decree vacated. *Brigham, Petitioner* (1900) 176 Mass. 223, 57 N. E. 328; *Whittley* v. *Whittley* (N. Y. 1908) 60 Misc. 201, 111 N. Y. Supp. 1078. So also, although the fact that one of the parties has remarried does not present an insuperable obstacle to the vacation of the decree, *Olmstead* v. *Olmstead, supra,* nevertheless the courts hesitate to grant relief where an innocent third party would thus be injured. *Maher* v. *Title Guarantee and Trust Co.* (1900) 95 Ill. App. 365; *Whittley* v. *Whittley, supra.* Some jurisdictions allow a decree of divorce obtained by collusion and taken by default to be opened in order to let in a defense to the suit, *Mulkey* v. *Mulkey* (1893) 100 Cal. 91, 34 Pac. 621; *Danforth* v. *Danforth* (1883) 105 Ill. 603, and one court has gone so far as to set aside a collusive divorce, even upon the application of one of the colluding parties, because of the fraud practised upon the law and the court in obtaining such a divorce. *McDonald* v. *McDonald* (1913) 175 Mo. App. 513, 161 S. W. 850. However, by the great weight of authority, a decree of divorce will not be vacated on the demand of a complainant who has been guilty of fraud or bad faith in obtaining the decree against a person not a party to the fraud, *Ferry* v. *Ferry* (1894) 9 Wash. 239, 37 Pac. 431; *Simons* v. *Simons* (1881) 47 Mich. 253, 10 N. W. 360, or in favor of one of the parties through whose collusion the divorce was obtained. *Karren* v. *Karren* (1902) 25 Utah 87, 69 Pac. 465; *Robinson* v. *Robinson* (1914) 77 Wash. 663, 138 Pac. 288; *Newman* v. *Newman* (1910) 27 Okl. 381, 112 Pac. 1007; *cf. Kinnier* v. *Kinnier* (N. Y. 1868) 53 Barb. 454, affd. 45 N. Y. 535.

EVIDENCE—ACTION FOR WRONGFUL DEATH—BURDEN OF PROOF WHERE SELF DEFENSE IS PLEADED.—In an action for wrongful death, the defendant pleaded self defense and introduced evidence tending to support that plea. *Held,* (three judges dissenting), since the plea was not an affirmative defence, the burden is on the plaintiff to show by a preponderance of evidence that the killing was not done in self defence. *Welch* v. *Creech* (Wash. 1915) 153 Pac. 355.

An intentional killing of a human being raises a presumption of law that it was wrongful. *Rutherford* v. *Foster* (C. C. A. 1903) 125 Fed. 187; *State* v. *Quick* (1909) 150 N. C. 820, 64 S. E. 168. If the

defendant seeks to controvert such a presumption on the ground of self defense, he pleads by way of confession and avoidance. 1 Chitty, Pleading (16th Am. Ed.) *551; *Brooks v. Haslam* (1884) 65 Cal. 421, 4 Pac. 399; *cf. Wright* v. *Union R. R.* (1900) 21 R. I. 554, 45 Atl. 548. It is generally held that the defendant must sustain such a defence by a preponderance of evidence, since the plea alleges affirmative matter. *Tucker* v. *State* (1899) 89 Md. 471, 478, 43 Atl. 778; *Rutherford* v. *Foster, supra; Brooks* v. *Haslam, supra;* see *Suell* v. *Derricott* (1909) 161 Ala. 259, 49 So. 895. The burden or necessity of establishing a case or an affirmative defence by a preponderance of evidence remains upon the same party throughout the trial, *Carroll* v. *Boston Elevated Ry.* (1909) 200 Mass. 527, 86 N. E. 793; *Supreme Tent K. of M.* v. *Stensland* (1902) 105 Ill. App. 267; see *Berger* v. *St. Louis Storage & Commission Co.* (1909) 136 Mo. App. 36, 116 S. W. 444, although the burden of going forward with the evidence to make or meet a *prima facie* case may shift from one party to the other. 2 Chamberlayne, Evidence, § 936 *et seq.*; 4 Wigmore, Evidence, § 2485 *et seq.* In the principal case, the burden of going forward with the evidence was shifted to the defendant by the presumption of wrongful death. He met that burden by introducing evidence of self defence, but, since this was affirmative matter, the defendant was not entitled to judgment unless he proved his defence by a preponderance of evidence. The prevailing opinion, in reaching a different conclusion, cannot be sustained either on principle or on authority.

Evidence—Declarations Showing Intention—Residence or Domicil. —In a proceeding to assess the transfer tax, the issue arose as to whether the decedent was a resident of New York or London. *Held,* declarations of the decedent were admissible on the issue. *In re Martin's Estate* (Surrogate's Ct., N. Y. Co., 1916) 157 N. Y. Supp. 474.

It is settled law that whenever the intent of a person is material to the issue, the declarations of that person evidencing his intent are relevant, and therefore admissible to prove it. See 10 Columbia Law Rev., 469. Since domicil is established not alone by an act, but by such act coupled with the intent to acquire or retain a domicil, *Matter of Newcomb* (1908) 192 N. Y. 238, 84 N. E. 950, when it becomes a question of fact whether a person has gained or lost a domicil, his declarations as to the fact will be admitted. *Viles* v. *Waltham* (1893) 157 Mass. 542, 92 N. E. 901; see *Ex parte Blumer* (1865) 27 Tex. 743. It is immaterial whether the declarant is alive or dead at the time his statements are sought to be proved, and his declarations may be testified to, *Reeder* v. *Holcomb* (1870) 105 Mass. 93, while the fact that they are self-serving and yet do not fall within the *res gesta* rule will not exclude them. *Ruckler* v. *Bolles* (C. C. A. 1897) 80 Fed. 504; see *Matter of Newcomb, supra.* Though the requirements for the admissibility of such declarations are amply satisfied under the rule admitting declarations showing intent, courts more frequently base their relevance and probative force on the *res gesta* or so-called verbal act doctrine, *Holyoke* v. *Holyoke's Estate* (1913) 110 Me. 469, 87 Atl. 40; *Matzenbaugh* v. *People* (1901) 194 Ill. 108, 62 N. E. 546; *Madison* v. *Guliford* (1911) 85 Conn. 55, 81 Atl. 1046, and reject declarations which do not accompany some act material to the issue, explaining or describing it. *Knox* v. *Montville* (1904) 98 Me. 493, 57 Atl. 792. The better doctrine, however, would permit such declara-

tions to be received regardless of their accompanying acts material to the issue, 4 Chamberlayne, Evidence, § 2665, although they would be accorded little weight if in fact contradicting the conduct of the declarant. See *Davis* v. *Adair* [1895] 1 Ir. 379; *Watson* v. *Simpson* (1858) 13 So. Ann. 337. In applying the rules governing domiciliary declarations to declarations concerning residence the principal case is clearly correct not only because of the ofttimes hazy distinction between domicil and residence, but also because the element of intent is required in both.

Insurance—Accident Insurance—Sunstroke—Disease—Accidental Means.—An accident policy insured against death or disability through external, violent, and purely accidental means, provided that if sunstroke due to external, violent and accidental means should result, independently of all other causes, in the death of the insured, the insurer would pay the indemnity. The insured died in consequence of a sunstroke suffered while pursuing his usual vocation in an ordinary way. *Held,* the insurer is liable. *Bryant* v. *Continental Casualty Co.* (Tex. 1916) 182 S. W. 673.

While, in the popular mind, sunstroke is probably considered as an accident, nevertheless, sunstroke is ordinarily, perhaps universally, classified as a disease. Richards, Insurance (3rd ed.) 541; *Dozier* v. *Fidelity & Casualty Co.* (C. C. 1891) 46 Fed. 446. Accordingly, in the few cases involving the question, liability for sunstroke has been denied where the policy insured against bodily injuries incurred through accidental means, sunstroke not being specifically mentioned in the policy. *Sinclair* v. *Maritime Passengers' Assur. Co.* (1861) 3 E. & E. 478; *Dozier* v. *Fidelity & Casualty Co., supra.* In intimating that sunstroke is an accident, the principal case is clearly at variance with the weight of authority. Assuming that sunstroke is a disease, where a policy specifically insures against sunstroke due to accidental means, a difficult question arises as to what constitutes accidental means within the intent of the policy. Thus it is said that a result produced by means all of which were intended, cannot be said to be accidental because the result was different from what was expected. *Schmid* v. *Indiana Travellers' Accident Assn.* (1908) 42 Ind. App. 483, 85 N. E. 1032; *Appel* v. *Aetna Life Ins. Co.* (1903) 86 App. Div. 83, 83 N. Y. Supp. 238, aff'd. 180 N. Y. 514, 72 N. E. 1139. In accordance with this principle, some courts have taken the view that, under provisions similar to those in the instant case, the insurer is not liable where death was caused by sunstroke suffered by the insured while in the discharge of his ordinary vocation. *Semancik* v. *Continental Casualty Co.* (1914) 56 Pa. Super. Ct. 392; *Elsey* v. *Fidelity & Casualty Co.* (Ind. App. 1915) 109 N. E. 413. On the other hand, under a construction that accidental means are those which produce effects which are not their natural and probable consequences, 4 Cooley, Insurance, 3156; *United States Mut. Accident Assn.* v. *Barry* (1889) 131 U. S. 100, 121, 9 Sup. Ct. 755; *Western etc. Assn.* v. *Smith* (C. C. A. 1898) 85 Fed. 401, it has been intimated that sunstroke suffered under such conditions is accidental within the meaning of the policy. *Gallagher* v. *Fidelity & Casualty Co.* (1914) 163 App. Div. 556, 148 N. Y. Supp. 1016.

Insurance—Policy Incontestable from Date of Issue—Effect of Fraud of the Insured.—Plaintiff sued as beneficiary of a policy of

life insurance which contained a stipulation that the policy was incontestable from date, except for certain enumerated causes not including fraud in the procurement of the policy. The insurance company defended on the ground of fraud, and that the stipulation violated a statute providing that a life policy should be incontestable after two years from date of issue. *Held,* one judge dissenting, the stipulation did not violate the statute, and precluded the defendant from setting up the insured's fraud as a defence. *Duvall* v. *National Ins. Co. of Montana* (Idaho 1916) 154 Pac. 632.

A provision in a life insurance policy limiting contestability, except for specified causes not including the fraud of the insured, to a reasonable period after the date of the policy, is an incentive to promptness and vigilance on the part of the insurer in investigating the good faith of the insured; hence it is upheld by the courts as precluding the defence of fraud after the period has elapsed. *Drews* v. *Metropolitan Life Ins. Co.* (1910) 79 N. J. L. 398, 75 Atl. 167; *Massachusetts Benefit Life Assn.* v. *Robinson* (1898) 104 Ga. 256, 30 S. E. 918; *Indiana Nat. Life Ins. Co.* v. *McGinnis* (1913) 180 Ind. 9, 101 N. E. 289. Where, however, the policy provides that it shall be incontestable immediately upon issue, the insurer practically offers an inducement to misrepresentation and concealment by the insured, and the courts, refusing to give effect to a contract which is subversive of public morality, *cf. Ritter* v. *Mutual Life Ins. Co.* (1898) 169 U. S. 139, 154, 18 Sup. Ct. 300, 305, generally deny recovery upon the policy where it was procured through fraud. *Reagan* v. *Union Mut. Life Ins. Co.* (1905) 189 Mass. 555, 76 N. E. 217; see *New York Life Ins. Co.* v. *Weaver's Admr.* (1902) 114 Ky. 295, 70 S. W. 628; *Welch* v. *Union Cent. Life Ins. Co.* (1899) 108 Iowa 224, 78 N. W. 853; *contra, Patterson* v. *Natural P. M. Life Ins. Co.* (1898) 100 Wis. 118, 75 N. W. 980. In the principal case, furthermore, the stipulation was invalid since it violated the policy of the law, not only as declared by the courts, but as reaffirmed in legislative enactment. *New York Life Ins. Co.* v. *Hardison* (1908) 199 Mass. 190, 85 N. E. 410.

Interstate Commerce Act—Free Transportation—Effect on Plaintiffs Right to Recover for Injury.—Defendant in error was injured while on a train running from Mississippi to Tennessee. He had paid no fare but was on the tender by permission of the engineer, who had no authority to issue free transportation. *Held,* § 1 of the Interstate Commerce Act, as amended by the Act of June 29, 1906, c. 3591, 34 Stat. 584, making it unlawful, with certain exceptions, for any interstate common carrier to give free transportation and for any person other than those excepted to use "any such . . . interstate free transportation", rendered his presence on the train illegal. *Illinois Cent. R. R., Yazoo & Miss. Valley R. R., & Boothe* v. *Messina* (U. S. Sup. Ct., Oct. Term 1915, No. 535), reversing S. C. 67 So. 963.

The broad and liberal construction of the statute by the court seems to further the intention of the act, which was to prevent common carriers from granting free transportation and also to prevent persons from travelling from one state to another without paying the usual fare. *United States* v. *Williams* (D. C. 1908) 159 Fed. 310. In *United States* v. *Martin* (D. C. 1910) 176 Fed. 110, by a liberal construction of the word "use", the act was applied to cover the sale of a pass, lawfully issued in the first place, by a person not within the exception into whose hands it had come. The question whether

the relation of carrier and passenger arises in such a case of gratuitous passage is one of state law, and although the plaintiff's presence on the train is illegal under the act, that fact will not deprive him of the protection required by local law. *Southern Pac. Co.* v. *Schuyler* (1913) 227 U. S. 601, 33 Sup. Ct. 277. According to the weight of authority, the illegality of the plaintiff's presence will not prevent recovery, on the ground that his rights do not depend on the illegal pass, but arise from the fact that the company is under a duty, imposed by public policy, toward any human being of whose safety as a passenger it has taken charge. *Gabbert* v. *Hackett* (1908) 135 Wis. 86, 115 N. W. 345; *Schuyler* v. *Southern Pac. Co.* (1910) 37 Utah 581, 109 Pac. 458; *McNeill* v. *Durham & C. R. R.* (1904) 135 N. C. 682, 47 S. E. 765. In the principal case, the plaintiff was not a passenger but a tresspasser, or at most a licensee, but there was also evidence of wanton negligence; hence the fact that he was violating the law should not prevent recovery for his injury.

Negligence—Manufacturer—Liability to Persons Having no Contractual Relations.—The defendant, a manufacturer of automobiles, sold one to a retail dealer who sold it to the plaintiff. Due to a defective wheel, which the defendant negligently failed to inspect, the plaintiff was thrown out and injured. *Held,* as the defendant should have foreseen that his negligence would result in an injury to the user of the automobile, the plaintiff can recover. *McPherson* v. *Buick Motor Co.* (N. Y. Ct. of App. 1916) 54 N. Y. L. J. 2339.

The liability of a manufacturer for his negligence, to parties having no contractual relations with him, is discussed in 2 Columbia Law Rev., 58, 105, 268; 4 *id.* 144; 5 *id.* 67; 7 *id.* 437; 13 *id.* 264. In numerous recent cases, the principles involved in this question have been applied, either in allowing recovery, *Krahn* v. *J. L. Owens Co.* (1914) 125 Minn. 33, 145 N. W. 626; *Thornhill* v. *Carpenter-Morton Co.* (1915) 220 Mass. 593, 108 N. E. 474, or in denying it. *Burkett* v. *Studebaker Bros. Manufacturing Co.* (1912) 126 Tenn. 467, 150 S. W. 421; *cf. Wood* v. *Sloan* (N. M. 1915) 148 Pac. 507. In a few recent suits brought against the manufacturers of automobiles for injuries to the users thereof caused by defective construction, similar considerations were held to determine the defendants' liability, *Olds Motor Works* v. *Shaffer* (1911) 145 Ky. 616, 140 S. W. 1047, or freedom from liability. *Cadillac Motor Car Co.* v. *Johnson* (C. C. A. 1915) 221 Fed. 801. There is, however, a noticeable tendency to increase the class of objects in reference to which mere negligence renders the manufacturer liable, *Ketterer* v. *Armour & Co.* (D. C. 1912) 200 Fed. 322; *Mazetti* v. *Armour & Co.* (1913) 75 Wash. 622, 135 Pac. 633, and the principal case, like a previous New York decision relating to automobiles, *Quackenbush* v. *Ford Motor Co.* (1915) 167 App. Div. 433, 153 N. Y. Supp. 131, represents a commendable extension of the doctrine of these cases.

Negotiable Instruments — Check Payable to Fictitious Payee — Effect.—Through the fraud of its agent, the plaintiff drew a check on the defendant bank payable to the order of a fictitious person. The check was indorsed in the name of the payee, presented to the bank and paid. The plaintiff now seeks to recover the amount. *Held,* the agent's knowledge of the fictitious character of the payee is imputed to the principal; hence the check was payable to bearer, and

the defendant is not liable. *Equitable Life Assur. Soc.* v. *National Bank of Commerce* (Mo. 1916) 181 S. W. 1176.

By the common law, both in England and in America, if the payee was fictitious, the bill was deemed payable to bearer only as against parties with knowledge of that fact. *Gibson* v. *Minet* (1791) 1 H. Bl. 569; *Bennett* v. *Farnell* (1807) 1 Campb. 130, 180 c.; *Armstrong* v. *National Bank* (1889) 46 Ohio St. 512, 22 N. E. 866; see *Shipman* v. *Bank of the State of N. Y.* (1891) 126 N. Y. 318, 27 N. E. 371; Story, Bills of Exchange (3rd ed.) §§ 56, 200; *contra, Kohn* v. *Watkins* (1882) 26 Kan. 691; 1 Daniel, Negotiable Instruments (6th ed.) § 139; see *Lane* v. *Krekle* (1867) 22 Iowa 399. But in England, the Bills of Exchange Act (1882) 45 and 46 Vict. c. 61, § 7 (3) altered that rule so that such instruments are payable to bearer regardless of whether the maker knew that the payee was fictitious. Chalmers, Bills of Exchange (7th ed.) pp. 22-25; *Bank of England* v. *Vagliano Bros.* [1891] App. Cas. 107; *cf. Macbeth* v. *North & South Wales Bank* (1906) 2 K. B. 718, [1908] App. Cas. 137. On the other hand, the Negotiable Instruments Law, now generally adopted in the United States, codifies the common law rule, and treats the bills as payable to bearer only when the maker knows the payee is fictitious. Negotiable Instruments Law, § 28, (N. Y. § 28); *Snyder* v. *Corn Exchange Nat. Bank* (1908) 221 Pa. 599, 70 Atl. 876; *Harmon* v. *Old Detroit Nat. Bank* (1908) 153 Mich. 73, 116 N. W. 617; see *Boles* v. *Harding* (1909) 201 Mass. 103, 87 N. E. 481. The knowledge of an agent cannot be imputed to the principal where the agent is acting adversely to the principal, and this is generally true where the principal is a corporation. 2 Mechem, Agency (2nd ed.) §1815 *et seq.*, § 1825; see 15 Columbia Law Rev., 710. Since the agent in the instant case committed the fraud in his own interest, and thus acted adversely to his principal, his knowledge that the payee was fictitious could not be imputed to the principal, and hence the decision seems erroneous.

Negotiable Instruments—Irregular Indorsements.—The defendant was sued on a promissory note as maker. The payee had transferred the note to the plaintiff before maturity by indorsing thereon, "Payment guaranteed; protest waived". *Held,* this constituted an indorsement, and since the plaintiff was a holder in due course, he was protected from defenses good between the original parties. *Mangold & Glandt Bank* v. *Utterback* (Okla. 1916) 154 Pac. 533.

An assignee of a negotiable instrument can only acquire the rights of his assignor, but an indorsee for value without notice, and before maturity, can acquire a title free from certain equities arising between the prior parties. See *Trust Co.* v. *Nat. Bank* (1879) 101 U. S. 68. In spite of this rule, when a transferor writes, "I assign", on the back of a note, it is held he intended to assume liability as indorser and pass title in the commercial sense. *Markey* v. *Corey* (1895) 108 Mich. 184, 66 N. W. 493; *Davidson* v. *Powell* (1894) 114 N. C. 575, 19 S. E. 601. Where the transferor assigns his right, title, and interest, the negotiable character of the note is not destroyed and the writing constitutes a commercial indorsement; *Lenhart* v. *Ramey* (1888) 3 Ohio C. C. 135; *Citizens Nat. Bank* v. *Walton* (1898) 96 Va. 435, 31 S. E. 890; *Evans* v. *Freeman* (1906) 142 N. C. 61, 54 S. E. 847; *contra, Aniba* v. *Yeomans* (1878) 39 Mich. 171; *De Hass* v. *Roberts* (C. C. 1894) 59 Fed. 853; *Gale* v. *Mayhew* (1910) 161 Mich. 96, 125 N. W. 781; but a guaranty written on the back of a note does not convey a

title free from equities arising between the original parties. *Edgerly* v. *Lawson* (1900) 176 Mass. 551, 57 N. E. 1020; *Trust Co.* v. *Nat. Bank, supra; cf. Brown* v. *Curtiss* (1849) 2 N. Y. 225. Since notice of protest and demand on the party primarily liable are not necessary for a recovery against a guarantor, it would seem that the transferor intended to assume an enlarged liability as indorser where he guarantees payment, waiving protest and demand. *German-American Sav. Bank* v. *Hanna* (1904) 124 Iowa 374, 100 N. W. 57; *cf. Dunham* v. *Peterson* (1896) 5 N. D. 414, 67 N. W. 293; *contra, Ireland* v. *Floyd* (1914) 42 Okla. 609, 142 Pac. 401. As the Negotiable Instruments Law, § 63, (N. Y. § 113) provides that a person placing his signature upon an instrument otherwise than as a maker, drawer, or acceptor, is deemed to be indorser unless he indicates clearly his intention to be bound in another capacity, the conclusion reached in the instant case is clearly sound. *Cf. Fansworth* v. *Burdick* (1915) 94 Kan. 749, 142 Pac. 863.

Negotiable Instruments—Payment to Unauthorized Agent—Misappropriation—Recovery by Payee.—Plaintiff sued for goods sold and delivered. It appeared that defendant had given a check for the amount due to the plaintiff's salesman, who, without authority, had indorsed plaintiff's name, cashed the check, and kept the proceeds. *Held,* the payee may recover from the maker as a debtor. *Siegel* v. *Kovinsky* (Sup. Ct., App. Term, 1916) 157 N. Y. Supp. 340.

To extinguish the debt the check must be accepted in payment and in due course be actually paid. *Bernheimer* v. *Herrman* (N. Y. 1887) 44 Hun 110. Since the maker of a negotiable instrument can satisfy it only by payment to the owner or the owner's authorized agent, *Marling* v. *Nommensen* (1906) 127 Wis. 363, 106 N. W. 844, and as the true owner's title to the check remains the same after an unauthorized or forged indorsement, he may recover the amount of the check as his property from a bank paying on such an indorsement, *Robinson* v. *Bank of Winslow* (1908) 42 Ind. App. 350, 85 N. E. 793; *Knoxville Water Co.* v. *East Tennessee Nat. Bank* (1910) 123 Tenn. 364, 131 S. W. 447, or usually from a maker paying under such circumstances. *Thomson* v. *Bank of British North America* (1880) 82 N. Y. 1; *Lochenmeyer* v. *Fogarty* (1884) 112 Ill. 572, 581. Some courts take the view that payment of a check delivered to an agent authorized to collect money and receive checks extinguishes the debt, even though the agent wrongfully indorsed the check and misappropriated the funds. The theory is that the loss ought to fall on the payee, who designated the agent to receive the check and thus put him in a position to perpetrate the fraud, rather than on the maker, who had no voice in selecting the agent and is in no way responsible for his acts. *McFadden* v. *Follrath* (1911) 114 Minn. 85, 130 N. W. 542; *Morrison* v. *Chapman* (1913) 155 App. Div. 509, 140 N. Y Supp. 700. But the principal case, in taking the opposite view, is in accord with the weight of authority. *Bernheimer* v. *Herrman, supra*; *Lochenmeyer* v. *Fogarty, supra; Thomson* v. *Bank of British North America, supra.*

Officers—Illegal Reduction of Salary—Release—Acceptance of Reduced Salary as Waiver.—The salary of architectual draftsman in the Department of Education is fixed by the Board of Alderman at $35 a week. The plaintiff, appointed to the office by defendant, was paid $30 a week for several years, and then raised to the pay fixed by

law. He thereupon sued for the arrears. The defendant set up a release, the consideration for which was the increase in plaintiff's pay, and also pleaded that plaintiff had waived his claim. *Held,* the release was void and the acceptance of the reduced salary did not operate as a waiver. *Pitt* v. *Board of Education* (N. Y. 1915) 110 N. E. 612.

The right of a public officer to his compensation is not created by contract, but belongs to him as an incident of his office, attached thereto by law. Throop, Public Officers, § 443. Hence a board of officials, invested merely with the right to make its own appointments, is powerless to make any change in the compensation of its appointees. Throop, *supra,* § 456; *Hogan* v. *Board of Education* (1911) 200 N. Y. 370, 93 N. E. 951; *cf. Riley* v. *Mayor etc. of N. Y.* (1884) 96 N. Y. 331. The power to fix the salary attached to plaintiff's office is not among the privileges conferred by statute upon the defendant. 8 Consol. Laws of N. Y. (1910) Ch. 16, § 310; see *Hogan* v. *Board of Education, supra.* Therefore, defendant's action in increasing plaintiff's pay to the amount fixed by law was merely the performance of defendant's legal duty and could not furnish a consideration for plaintiff's release, *Hale* v. *Dressen* (1899) 76 Minn. 183, 78 N. W. 1045; *Richmond & Danville R. R.* v. *Walker* (1893) 92 Ga. 485, 17 S. E. 604; *Early* v. *Burt* (1886) 68 Iowa 716, 28 N. W. 35, if, indeed, the release was not otherwise void as against public policy. *Cf. Purdy* v. *City of Independence* (1888) 75 Iowa 356, 39 N. W. 641; *Lancaster County* v. *Fulton* (1889) 128 Pa. 48, 18 Atl. 384; Mechem, Public Officers, § 377. Finally, the plaintiff's acceptance of the diminished salary and performance of the duties of the office did not constitute a waiver of the claim nor raise an estoppel against the plaintiff, since the courts will not allow an illegal result to be achieved by indirect means. *Kehn* v. *State* (1883) 93 N. Y. 291; *Bowe* v. *City of St. Paul* (1897) 70 Minn. 341, 73 N. W. 184; *Glavey* v. *United States* (1900) 182 U. S. 595, 609, 21 Sup. Ct. 891, 896.

Parent and Child—Contracts—Compensation for Services Rendered by Member of Family.—The plaintiff obtained a judgment against her mother's estate for board and services rendered to the mother during her life. Upon appeal by the executor, *held,* besides evidence of an express contract, there were other facts showing an agreement to pay sufficient to take the case to the jury. *LeCount* v. *Fountain's Estate.* (Mo. 1916) 182 S. W. 102.

In action by an executor to recover a sum of money from the testatrix's daughter, the latter filed a counterclaim for services rendered to the mother upon an alleged express contract. *Held,* evidence of the contract was not sufficient to take the case to the jury. *Bishop* v. *Newman's Ex'r.* (Ky. 1916) 182 S. W. 165.

At common law a child was under no legal obligation to support a parent, and it should be noticed that statutes creating this duty refer only to those persons who, through disability, are likely to become a charge upon the community. Schouler, Domestic Relations (5th ed.) § 265; Battershall, Domestic Relations, 398; see *Duffy* v. *Yodi* (1906) 149 Cal. 140, 84 Pac. 838. In other cases, there is no difficulty, generally speaking, in upholding an express contract between members of the same family, even when the relationship is that of parent and child. Tiffany, Domestic Relations (2nd ed.) 307. But the broad rule that whenever service is rendered and accepted, a contract to pay therefor will be presumed, 2 Parsons, Contracts (9th ed.) *46; see

Wood v. *Lewis' Estate* (1914) 183 Mo. App. 553, 562, 167 S. W. 666, is largely qualified when the parties are related by blood or marriage, or live together under similar circumstances. The fact of such relationship may serve merely to take away the presumption that would obtain if the parties were strangers, *Spring* v. *Hulett* (1870) 104 Mass. 591; *In Re Pauly's Estate* (Iowa 1916) 156 N. W. 355; see *Guild* v. *Guild* (1833) 32 Mass. 129, or it may create, as pointed out in the second principal case, a positive presumption that the services were gratuitous. *Lansing* v. *Gregory* (1915) 128 Minn. 496, 151 N. W. 277; *Heffron* v. *Brown* (1895) 155 Ill. 322, 40 N. E. 583; *Wood* v. *Lewis' Estate, supra.* A few jurisdictions demand that an express contract be shown, *Hinkle* v. *Sage* (1902) 67 Ohio St. 256, 65 N. E. 999; *Murphy* v. *Murphy* (1890) 1 S. D. 316, 47 N. W. 142; *Tyler* v. *Burrington* (1876) 39 Wis. 376, but a majority of the courts allow a recovery when a contract may clearly be implied from all the circumstances. *McGarvy* v. *Roods* (1877) 73 Iowa 363, 35 N. W. 488; *Lansing* v. *Gregory, supra*; *Heffron* v. *Brown, supra.*

Pleading and Practice—Detinue—Scope of General Issue.—In an action of detinue for a note, *semble,* the plea of *non detinet* puts in issue both plaintiff's property in the note and defendant's detention of it. *Malone* v. *Davis* (W. Va. 1915) 86 S. E. 1100.

Following the rule of the common law, *Philips* v. *Robinson* (1827) 4 Bing. 106, courts in this country, both under statute and independent thereof, have uniformly held that the general issue in detinue includes within its scope not only the fact of the detention by the defendant, but also the plaintiff's property or right to immediate possession. *Robinson* v. *Peterson* (1891) 40 Ill. App. 132; *Bolton* v. *Cuthbert* (1902) 132 Ala. 403, 31 So. 358; *Snellgrove* v. *Evans* (1906) 145 Ala. 600, 40 So. 567; but *cf. Chappell* v. *Falkner* (1914) 11 Ala. App. 382, 66 So. 890. Accordingly, proof that the plaintiff's title has been lost by adverse possession, *Elam* v. *Bass's Executors* (1814) 18 Va. 301; *Smart* v. *Baugh* (1830) 26 Ky. *363; *Lay's Exr.* v. *Lawson's Admr.* (1853) 23 Ala. 377, 392, or that it was fraudulently obtained, *Stratton* v. *Minnis* (1811) 16 Va. 329, or that the debt secured by the mortgage under which the plaintiff claims has been paid, *Pinckard & Lay* v. *Bramlett* (1910) 165 Ala. 327, 51 So. 557, may be given in evidence under the plea of *non detinet.* On the other hand, the defendant cannot, under the general issue, prove that his detention is justified, *Richards* v. *Frankum* (1840) 6 Mees. & W. *420, as, for instance, that he has a lien on the goods, Co. Lit. *283a; see *Philips* v. *Robinson, supra,* or that he acted under legal process, *Cromwell* v. *Clay* (1833) 31 Ky. *578; *Daniel* v. *Hardwick* (1889) 88 Ala. 557, 7 So. 188, but he must plead these defenses specially. Defenses arising after the institution of the suit are inadmissible under this plea; the proper plea is *puis darrein continuance. Brown* v. *Brown* (1848) 13 Ala. 208; *Whitfield* v. *Whitfield* (1870) 44 Miss. 254. In England and Canada, by the Hilary Rules of 1834, 5 B. & Ad. Appendix ix, the scope of *non detinet* was restricted to a denial of the detention, so it no longer includes a denial of the plaintiff's property. See *Reynolds* v. *Waddell* (1854) 12 U. C. Q. B. 9; Stephen, Pleading, *177.

Removal of Causes—Diverse Citizenship—Suit in Third State—Removal to Defendant's District.—The plaintiff, a citizen of Montana, sued two defendants, citizens of Wisconsin, in the State Court

of Minnesota. The defendants removed to a United States District Court in Wisconsin, on the ground of diverse citizenship, and the plaintiff moved to remand. *Held,* the motion should be granted. *Eddy* v. *Chicago & N. W. Ry.* (D. C., W. D., Wis. 1915) 226 Fed. 120.

Where a citizen of one State sues a citizen of a second in the State courts of a third, the Supreme Court has held that the cause is not removable to the Federal court for the district in which the suit is pending, on the ground that the Federal court for that district would not have had original jurisdiction of the suit. *Ex parte Wisner* (1906) 203 U. S. 449, 27 Sup. Ct. 150. Prior to this decision, some of the Federal courts had allowed removal, *Burck* v. *Taylor* (C. C. 1889) 39 Fed. 581, while others had denied it. See *Foulk* v. *Gray* (C. C. 1902) 120 Fed. 156. This doctrine apparently rests on a confusion betweeen the general jurisdiction of the district courts, and the provisions as to the place of bringing a given suit; *Louisville & N. R. R.* v. *Western Union Telegraph Co.* (D. C. 1914) 218 Fed. 91; and in a later case the Supreme Court has held that the plaintiff may waive his objections to the jurisdiction. *Matter of Moore* (1908) 209 U. S. 490, 28 Sup. Ct. 585; see 9 Columbia Law Rev., 545. But decisions like the principal case have further held that such suit is not removable to the Federal court of the district of the defendant's residence, by construing § 29 of the Judicial Code (1911) 36 Stat. 1095, to mean that a suit may be removed only into the district court of the district where such suit is pending. *St. John* v. *United States Fidelity, etc., Co.* (D. C. 1914) 213 Fed. 685; *Pavick* v. *Chicago M. & St. P. Ry.* (D. C. 1914) 225 Fed. 395; *St. John* v. *Taintor* (D. C. 1915) 220 Fed. 457; *contra* (on the ground that the section is merely procedural, and not exclusive), *Stewart* v. *Cybur Lumber Co.* (D. C. 1914) 211 Fed. 343; *Park Square Automobile Station* v. *American Locomotive Co.* (D. C. 1915) 222 Fed. 979; see *Mattison* v. *Boston & M. R. R.* (D. C. 1913) 205 Fed. 821. As the statute provides that only a non-resident defendant may remove, under the restrictive view the suit cannot be removed, without the consent of the plaintiff, when it is brought in a third State, but only when it is brought in the State court situated in the district of the plaintiff's residence, and then only to the district court of that district. It is hardly conceivable that Congress contemplated this result.

Sales—Standing Timber—Reversion of Title.—The plaintiff claimed title to certain timber which the defendants had conveyed to his assignors by a deed which also authorized the grantees and their assignees to enter upon the defendants' land for the purpose of cutting and removing the timber. In an action to restrain defendants from cutting the trees, *held,* one judge dissenting, a fee simple estate in the trees was conveyed and title did not revert to the grantors after a reasonable time for cutting and removing had elapsed. *Chapman* v. *Dearman* (Tex. Civ. App. 1915) 181 S. W. 808. See Notes, p. 412.

Specific Performance—Hardship—Events Subsequent to the Making of the Contract.—A tenant brought a bill for specific performance of an option to renew in a lease providing for renewal on the same terms and conditions. Subsequent to his election to renew, the landlord, also the owner of a lot adjoining the leased premises, discovered a drain running from the former under the latter, and refused to

renew except upon the insertion in the lease of a provision to the effect that such renewal should not create any easement unless such easement legally existed prior to the renewal. The court *held* for the landlord. *Humpfner* v. *Beers* (N. Y. App. Div., 1st Dep't, 1916) 157 N. Y. Supp. 345. See Notes, p. 410.

Trade-Marks and Trade Names—Nature and Extent of the Right in Trade-Marks.—The plaintiff sought to restrain the use of his trade-mark by the defendant in Kentucky, to which territory the plaintiff had not extended his business. *Held,* the use by the defendant would not be restrained. *Allen & Wheeler Co.* v. *Hanover Star Milling Co.* (U. S. Supreme Court, Oct. Term 1915, No. 30, March 6, 1916). See Notes, p. 416.

Wills—Construction—Erroneous Description.—The testator's will purported to give forty-seven acres of land to his wife and daughter. The will described as the devise, a small tract of seven acres and "the south half of the south half of the northeast quarter". The latter area included twenty acres not owned by testator and so gave the wife and daughter only twenty-seven acres, twenty of which were also given by a subsequent clause to remaining children. The will when so read left deceased intestate as to forty acres, the south half of the south half of the northwest quarter contiguous to the seven acres. *Held,* it was proper to construe the will as if the word "north-west" was written therein instead of "north-east", thereby harmonizing all provisions and passing the whole estate. *Mudd* v. *Cunningham* (Mo. 1915) 181 S. W. 386.

The intention of the testator as gathered from the will in its entirety is to govern. *Stewart* v. *Jones* (1909) 219 Mo. 614, 118 S. W. 1; see *Yates* v. *Shern* (1901) 84 Minn. 161, 86 N. W. 1004. But where the language is ambiguous the court will endeavor to construe the instrument so as to form one consistent whole. *Matter of Title G. & T. Co.* (1909) 195 N. Y. 339, 88 N. E. 375. If not contrary to its express terms the will, if possible, should be so construed as to avoid intestacy in whole or in part. *Boehm* v. *Baldwin* (1906) 221 Ill. 59, 77 N. E. 454; *Miners* v. *Miners* (1904) 179 Mo. 614, 78 N. W. 795. Facts and circumstances surrounding testator at the time he made the will may be shown to aid the court in its construction, where the language of the will is ambiguous, see *Morris* v. *Sickly* (1892) 133 N. Y. 456, 31 N. E. 332, or where there is a latent ambiguity. See *Patch* v. *White* (1886) 117 U. S. 210, 6 Sup. Ct. 617. If the ambiguity consists of a misdescription this can be stricken out; and if enough remains to identify the person or thing, the gift is good. 1 Roper, Legacies (4th ed.) 297; *Patch* v. *White, supra;* see *Finlay* v. *Kings' Lessee* (1885) 28 U. S. 346, 377. But words of correct description cannot be written into a will; and if testator's intention is not disclosed from the will and admissible surrounding facts, independently of the omission or mistake, the gift will fail. *Hawman & Wife* v. *Thomas' Ex'r.* (1875) 44 Md. 30. In the principal case if "east" is stricken from "north-east" the misdescription is removed and enough remains to show that testator intended the southern part of the northwest quarter to go to his wife and daughter. It is unnecessary under the holding of the court in the principal case, which seems correct, to

regard anything as having been written into the will. *Whitehouse* v. *Whitehouse* (1907) 136 Iowa 165, 113 N. W. 759.

WILLS—DEVISE TO CHURCH—STATUTORY RESTRICTION ON CAPACITY OF CHURCH TO HOLD PROPERTY.—The testatrix devised three hundred and ten acres of land in remainder to a church. Under Ky. Stat. § 319, no church is capable of taking or holding title to more than fifty acres. *Held,* such devise was effectual to give the church title to fifty acres of the land. *Compton* v. *Moore* (Ky. 1916) 181 S. W. 360.

While it has been held that a devise to a corporation, in excess of the amount which it is authorized to hold, can be attacked only in a direct proceeding by the state, *Farrington* v. *Putnam* (1897) 90 Me. 405, 37 Atl. 652; see *Jones* v. *Habersham* (1882) 107 U. S. 174, 188, the validity of such a devise, according to the weight of authority, may be questioned by a person whose interests will be affected by the transgression of the power of the corporation. *Matter of McGraw* (1888) 111 N. Y. 66, 19 N. E. 233; *House of Mercy* v. *Davidson* (1897) 90 Tex. 529, 39 S. W. 924. In the jurisdictions which follow the latter holding, a devise to a corporation, which already holds property to the limit of its capacity, fails absolutely. *Matter of McGraw, supra*; *House of Mercy* v. *Davidson, supra*; *cf. Cromie's Heirs* v. *Louisville Orphan's Home Society* (1867) 66 Ky. 365. Under statutes which restrict the power of a testator to leave property by will to a charitable institution, where the testator attempts to leave a greater amount, the courts, in trying to give effect to the legacy as far as possible, hold that the institution is entitled to the statutory allowance. *In re Peabody's Estate* (1908) 154 Cal. 173, 97 Pac. 184; see *Paschal* v. *Acklin* (1863) 27 Tex. 173, 196; *cf. Montgomery* v. *Millikin* (1845) 13 Miss. 151; *contra, Kelley* v. *Welborn* (1900) 110 Ga. 540, 35 S. E. 636. Similarly, where the capacity of the corporation to hold property is restricted, and the corporation does not hold up to the limit, the sound rule would seem to be that it is entitled to so much of the property as it is by statute allowed, in the absence of a clear intent on the part of the testator to pass the gift as a whole or not at all. *Wood* v. *Hammond* (1889) 16 R. I. 98, 17 Atl. 324; *Chamberlain* v. *Chamberlain* (1871) 43 N. Y. 424, 439.

WILLS—REVOCATION—PRESUMPTION—DECLARATIONS OF TESTATOR.—In probate proceedings to prove a lost will the declarations of the testator were offered to rebut the presumption of revocation. *Held,* the declarations were admissible. *In re Keen's Estate* (Mich. 1915) 155 N. W. 514.

Where it is proved that a will was made and the testator retained custody of it or had ready access to it, the presumption arises, if the will cannot be found after his death, that he destroyed it *animo revocandi,* 1 Schouler, Wills, Executors and Admrs. (5th ed.) § 402, but by the weight of authority such presumption may be rebutted by the declarations of the testator. *In Matter of Johnson's Will* (1874) 40 Conn. 587; *Sugden* v. *St. Leonard* (1876) L. R. 1 P. D. 154; *cf. Aldrich* v. *Aldrich* (1913) 215 Mass. 164, 102 N. E. 487. This is clearly an exception to the hearsay rule, 3 Wigmore, Evidence § 1736, for which there is said to be as much justification as for the rule admitting statements of relatives in pedigree cases. *In re Miller's Will* (1907) 49 Ore. 452, 90 Pac. 1002. But according to another theory it is pos-

sible to admit the declarations of a testator without breaking the hearsay rule. By this theory the declarations are evidence of a belief of the declarant which may be considered as circumstantial evidence of sufficient weight to establish the existence of the will. 1 Greenleaf, Evidence (16th. ed.) 260; see *Jackson* v. *Hewlett* (1913) 114 Va. 573, 77 S. E. 518. The fear of unreliability of such declarations goes to their weight and not to their admissibility. *Patterson* v. *Hickey* (1861) 32 Ga. 156. The New York rule is sometimes said to exclude such declarations because they are mere hearsay, but the rule in this jurisdiction is due to a statute which requires that a will must be proved to have been in existence at the death of the testator or fraudulently destroyed in his life time before it can be probated as a lost will, N. Y. Code Civ. Proc. § 1865, and the declarations of the testator to rebut the presumption of revocation are not competent to prove the statutory requirement of the existence of the will. *Matter of Kennedy* (1901) 167 N. Y. 163, 60 N. E. 442.

BOOK REVIEWS.

G. Forrest Butterworth, Jr., *Editor-in-Charge.*

The Administration of Justice in Criminal Matters (In England and Wales). By G. Glover Alexander, M.A., LL.M., of the Inner Temple, Barrister at Law. Cambridge: The University Press. 1915. pp. x, 235.

This book is a reprint and enlargement of an earlier volume published as one of the Cambridge Manuals of Science and Literature. It is "intended to serve as a first book for newly appointed Justices of the Peace, superior police officers, and law students," but it is also intended as a book for the general reader who is interested in law and the problems of government. The book is a masterly presentation of the workings of the criminal law and procedure of England and Wales. The author begins by a chapter on the work of justices of the peace, and sets forth in detail the structure and procedure of the courts held by such justices. This chapter brings out in a striking way the importance of the justice of the peace in Great Britain. There are more than 20,000 such justices in England and Wales, mostly laymen, and almost all of them serving without pay, and yet by them the vast majority of criminal cases (amounting to about 730,500 in 1912) are disposed of. Moreover, the author says that the system works well; that there are comparatively few cases of substantial injustice under it, and that it has won the admiration of foreign critics.

A most interesting portion of the book is the account of the proceedings at a criminal trial (pp. 105-120). In this, the American lawyer is struck by the greater simplicity of the English procedure as compared with our own, and by the advantages that come through the English rule that enables the judge to express his opinion to the jury on matters of fact as well as of law.

In regard to the jury system, the author says that it works well in England, and the fact that there is a jury is a benefit to the judge in that his duty of summing up the case to them keeps his attention alive during the trial. There seems to be but little difficulty in selecting jurors in criminal cases in England, the difficulty experienced in America on this point being practically unknown, Sir James Fitzjames Stephen being quoted as not remembering more than two occasions in his whole experience where there were any considerable number of challenges.

In cases where insanity is a defence, the defendant may set up the plea "Guilty, but insane." This is not really a plea of guilty, however, it being held that a verdict in accordance with such a plea is an acquittal. Felstead *v.* Rex (1914) A. C. 534. The plea merely admits the commission of the act by the prisoner but not his legal guilt therefor. A verdict in favor of the prisoner under the above plea usually results in his detention by the Crown for life (p. 116), so that the plea is rarely made save in homicide cases.

In the interesting account of the new English Court of Criminal Appeal, one is struck with the comparative rarity of such appeals, only about six per cent. of those convicted appealing in 1912. In murder cases, "out of the twenty-five persons sentenced to death, seven applied

for the leave to appeal and five appealed on grounds involving questions of law. All the appeals were unsuccessful" (p. 129).

The book has been written with great care, and, in spite of the technical nature of the matter with which it deals, it is a work of great interest. The author betrays a pardonable pride in the excellent working of the English criminal courts. One cannot read this book without feeling that this pride is justified and without admitting that the land to which our criminal law owes its origin still affords the best example of its efficient administration.

Ralph W. Gifford.

A Selection of Cases Under the Interstate Commerce Act. Edited by Felix Frankfurter. Cambridge: Harvard University Press. 1915. Pp. xi, 706.

We do not have to hark back many years to the time when the law of carriers was taught as merely a subdivision of the law of bailments, which itself constituted but a part of a course on personal property. But at present the curriculum of nearly every law school includes a course on carriers. At first such a course generally includes not only the peculiar law of common carriers, but also the general doctrines of public service applicable alike to many public utility businesses. Now, however, there is a strong tendency to divide this work into two courses, one on the law of public service applicable to all public utilities including common carriers, and the other dealing only with the peculiar doctrines of law applicable to common carriers, and to some extent also to innkeepers. But Professor Frankfurter has gone still further in the division and specialization of courses, and has prepared a case-book of some seven hundred pages to be used for a separate course on the Interstate Commerce Act.

Professor Frankfurter justifies the publication of his case-book on the ground that "the intrinsic importance of the subject, the part it plays, and the greater part it is likely to play, in the work of the modern lawyer, calls for the training of men equipped to participate in its enforcement as lawyers, administrators and judges. In other words, the subject calls for organized, systematic study as one of the most vital branches of the law." The importance of the subject is undeniable, and it is equally true, as the editor states, that "the real scope and meaning of the Act must be sought in a mass of decisions through which there is gradually emerging a body of principles." Still it may be doubted if these facts call for the establishment in our law schools of a separate course on the Interstate Commerce Act. It would seem that many of the questions raised in this collcetion of cases are already treated in courses on Carriers, Public Service and Constitutional Law, and that much of a course based upon this case-book would, therefore, constitute an unnecessary duplication of work already provided for.

However, the material itself which is gathered together in this volume is very interesting, and will thoroughly repay the reader for a careful perusal, be he teacher, student or practitioner. The cases which are reprinted are very much up to date, having been decided for the most part by the Supreme Court of the United States within the last five years, and are well chosen and edited. The material is arranged to cover the questions of the scope of the commerce regulated by the act, including the kinds of carriers, commerce and services affected thereby; the duties of carriers under the act, and the functions of the Interstate Commerce Commission and of the courts in the

enforcement of the act. It is only to be regretted that the use of this material is not made more available by an index, and that the text of the Interstate Commerce Act is not reprinted as an appendix to the volume.

Charles K. Burdick.

THE MONROE DOCTRINE—AN INTERPRETATION. By ALBERT BUSHNELL HART. Boston: LITTLE BROWN & Co. 1916. pp. xiv, 445.

To lay bare the sources, to trace the gradual modification and development, to outline the present scope, to frame a working definition suited to modern conditions and to hazard a prognostication of the effect upon the future of that oft-invoked yet somewhat nebulous and inchoate Article of American Political Faith known as the Monroe Doctrine, such is the complex task the author of this book has set for himself. Reasonably perfect attainment of these aims, particularly in a small volume, demands a multiplicity of talents. To achieve success a writer must first of all be endowed with a superhuman abundance of patience to sift the chaos of overlapping or contradictory utterances of commentators and public men, in office and without, before the time of Monroe as well as after, who have delivered themselves of opinions dealing with the subject matter of the Doctrine. He must examine these opinions minutely in order to select for special emphasis those which have interpreted, extended, altered or perpetuated the principles formulated by Adams and Monroe and to reject, after labelling them so that he who reads may beware, those whose principal consequence has been obfuscation. In this examination he must combine with the trained insight of the political scientist the restraining impartiality of the judge. He must possess the verbal dexterity of the lexicographer and the clairvoyant's foresight. And finally he must bring to his work the constructive literary ability of the historian, the power to marshal facts in orderly sequence, to point out the unifying principle running through them and to present the results of his research in a form at once organized, clear and coherent.

Exercise of many of these talents is manifest in this book. Painstaking analysis of the principal extracts from statesmen and writers brings to the reader's attention the influence of the particular circumstances which called forth the remarks and uncovers the concealed motive or idea lying beneath them. Professor Hart avoids most skilfully the dangerous shoals of personal political preference and discusses the performances of Republican, Democrat and Progressive alike with scrupulous non-partisanship. It is to be regretted that the same spirit of impersonality has not been observed toward contemporary commentators, for certain unnecessary remarks about Professor Usher detract from the dignity of the book and seem to exhibit questionable taste. Most entertaining and original, however, is the forecast of the future, which embraces a clever analysis of American character and belief and a comparison of these with the attitude of the remainder of the world, especially Germany. It also discusses at length the gravity of the "Doctrine of American Protectorates" and the responsibility assumed by the United States in its new rôle of international policeman of certain portions of Latin-America and concludes with a well reasoned appeal for military preparedness if the present "American Doctrine", in which Professor Hart seems thoroughly to believe, but which seems admittedly to be no part of international law, is to be maintained. The author's formulation of this

modern "American Doctrine" of "Permanent Interest" "as a condensed statement of what he believes to be the body of principles held by the American people" discloses thorough familiarity with international events of recent years and keen appreciation of their significance. Nothing illustrates more pointedly the development of the Monroe Doctrine of 1823 than a comparison of this "American Doctrine" with the language of Monroe's original pronunciamento.

Unfortunately Professor Hart did not see fit to incorporate into his text a direct line-for-line comparison of the old doctrine and the new, which would have crystallized for the reader the differences between the two. Indeed the book as a whole suffers for want of judicious contrasts. Take, for example, the Doctrine laid down by Monroe and Adams. This resembles a rope, composed of many strands braided together, among them the "Future Colonization" strand, the "Intervention in the Wars of the European Powers" strand, the "Two Spheres" strand and the "Extension of a European Political System" strand. All these strands bear minute resemblance to each other and the differences between them do not become obvious at a glance. The author would have performed a valuable service, well worth the additional space, had he paused when discussing the original Monroe Doctrine to contrast and differentiate its component elements as well as to interpret these individually in order to carry the reader into the subsequent portions of the book with a clear realization that the original doctrine was a thing of many parts and a clear concept of the import of each part. For fixing points swiftly and permanently in another's mind few devices are more successful than contrast and by failing to rely to any great extent upon this simple expedient Professor Hart has deprived himself of a valuable and effective aid to clarity. At times, too, the author himself seems to be somewhat hazy upon minor points. For example, the doctrine of the "Two Spheres" appears to mean now avoidance of foreign alliances (p. 12), now non-interference with the internal concerns of European powers (p. 68), and to be invoked now for exposure as a doctrine inconsistent with the retention of any colonies by European states (p. 70), now for stigmatization as entirely obsolete (p. 367), until the perplexed reader finds himself wondering what was its actual significance to Professor Hart himself.

A graver fault, however, lurks in the chapter-construction, particularly in the first half of the book. Numerous incidents, or utterances not infrequently unrelated by express words of the text, sometimes belonging to totally distinct logical or chronological sequences will be found standing side by side as if put together almost at haphazard. Occasionally the author reduces these somewhat incoherent chapters to real unity by a section in the nature of a summary affixed to the very end (p. 140). But often the unifying principle running through the conglomeration of facts is not made plain and the reader has to obtain for himself as best he may the broad panoramic outlook in which single episodes dwindle to their proper dimensions as mere "parts of one stupendous whole". Obviously the true relations to each other of the different extracts and citations are known perfectly to the author. But unfortunately he has not always taken the pains to lay a clear perspective before his reader and the latter finds himself driven at times to the dubious expedient of piecing together the different section-headings or the laborious alternative of re-reading the entire chapter.

Although on account of these structural blemishes the work will hardly take rank as a masterpiece, the book, as a whole, leaves a very favorable impression. Historical material abounds and the complicated tripartite relations which have existed in the past between Europe, Latin-America and the United States are unraveled at length and examined with just valuation of the conflicting rights of the parties concerned. "The specious present" is always most difficult to gauge. Nevertheless the author has made a brilliant analysis of world conditions as they exist today and the causes immediately underlying them. And Professor Hart's observations concerning the future ought to prove most valuable and helpful to any person inclined to speculate about the shadowy and threatening period of readjustment of international relations which seems to be looming up at the close of the present European war.

Thomas A. Larremore.

THE MODERN LAW OF EVIDENCE. By CHARLES FREDERIC CHAMBERLAYNE. Volume V. Media of Proof, edited by HOWARD C. JOYCE. Albany: MATTHEW, BENDER & Co. 1916. pp. xvi, 4621-5836.

This volume, which is the second to be published after Mr. Chamberlayne's untimely death, completes his treatise on the Modern Law of Evidence. The first four volumes of the work, two of which were published in 1911, and two in 1913, are already familiar to the profession. The fifth volume, under the general heading, Media of Proof, includes many of the most important branches generally treated in a work on evidence. It treats of writings and documents; of the parol and the best evidence rules; of evidence by perception, "having reference to those facts of which the court requires knowledge by the exercise of its own perceptive faculties"; and lastly, of witnesses, their attendance, incompetency, examination, and impeachment, with a separate chapter on privileged communications. A table of cases for the entire work is particularly welcome, and together with an alphabetical index with cross references to the general index in volume four, does much to render the work more available. Altogether, the author has covered the field in a most comprehensive and scholarly manner. The unwieldiness of the work for ready reference, due to the unusual method of treatment and arrangement, and to the unfamiliar nomenclature employed, disappears to a large extent with use, and the searcher, once he finds the treatment of his point, is sure to be rewarded by an adequate discussion and numerous citations to cases.

BLACKSTONE'S COMMENTARIES. Edited by WILLIAM CAREY JONES. 2 Vols. San Francisco: BANCROFT-WHITNEY Co. 1915. pp. cciv, 2770.

The text of the Commentaries used in this edition is that of Hammond's Edition, 1890, which in turn was taken from the eighth edition of the Commentaries published by the Clarendon Press, Oxford, 1788, and is complete. The most valuable of Hammond's notes have been retained, and in addition to these, are notes by the editor and others intended to show the more important modifications of the common law and thus give the work present and real value as a legal treatise. There have also been incorporated extracts from such writers as Pollock, Maitland, Vinogradoff, Langdell, Burdick and other recognized authorities on the theory and practice of the law. At the end of

Book III, is a supplementary chapter on Conflict of Laws. The addition of such a treatise on a branch of the law which has developed since the time of the publication of the Commentaries is only one example of the editor's effort to bring Blackstone's work down to date as a reference work and treatise on the law. This aim has been carried out, also, in the arrangement of the text. While the original arrangement has been retained, the old paging being indicated in the margins, the text has been divided into sections, in general following Blackstone's paragraphs, with section heads in black-face type. In short the whole scheme of the work admirably effects the result which was evidently sought; namely, facility of reference and real value to the student who has something more than mere historical interest in Blackstone.

Books Received.

A Digest of English Civil Law. Edited by Edward Jenks, M.A., B. C. L. Book 4, Family Law, by W. M. Geldart, M.A., B. C. L. Book 5, Succession, by W. S. Holdsworth, D. C. L. London: Butterworth & Co. 1916. pp. liii, 1155-1291.

Treaties, Their Making and Enforcement. 2nd ed. By Samuel B. Crandall, Ph.D. Washington: John Byrne & Co. 1916. pp. xxxii, 663.

Commercial Mortmain. A Study of the Trust Problem. By John R. Dos Passos. New York: The Bench & Bar Co. 1916. pp. viii, 101.

Wood on Limitations. By H. G. Wood. 2 vols., 4th ed. Revised and enlarged by DeWitt C. Moore. Albany: Matthew, Bender & Co. 1916. pp. ccliii, xiii, 1765.

The Law and the Practice of Municipal Home Rule. By Howard C. McBain. New York: Columbia University Press. 1916. pp. xviii, 724.

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Year Books 5. Edward II. The Publications of the Selden Society. Vol. XXXI. The Year Series, Vol. XI. Edited by William Craddock Bolland. London: Bernard Quaritch. 1915. pp. xlix, 281.

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Partition and Maintenance. Handbooks of Hindu Law, Part II. By H. D. Cornish, B.A. London: Cambridge University Press. 1915. pp. xxxvi, 203.

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THE "MUTUALITY" RULE IN NEW YORK.

The term "mutuality" when applied to contracts is sometimes used in a loose and inaccurate sense to indicate the mutuality of obligation which results from the exchange of mutual promises, each of which is consideration for the other in the creation of a bilateral contract.[1] When used in this sense mutuality is essential to the creation of the contract for without it there is no consideration for the promisor's promise. If there is want of mutuality there is no legal obligation on either side, although obviously in the case of a unilateral contract where *A* does an act or gives something in exchange for *B's* promise, there is a contract, but no mutuality, since *A* is not bound by the contract, although he is entitled to enforce it. More accurately used, the term "mutuality" refers to the rule very generally applied in equity that specific performance of a contract will not be decreed unless the defendant has received or the court is in a position to give to the defendant all that he is entitled to receive under the contract in exchange for the performance of it on his part.

It is obvious that this rule has nothing to do with the rule first referred to, which relates to the formation of a contract, since it becomes applicable only when a contract has actually become legally obligatory and has become the subject of inquiry by a court called upon to exercise its equity powers of specific performance. In other words, there may be cases where a contract has not come into existence because the plaintiff has failed to give a promise

[1]Willets *v.* The Sun Mut. Ins. Co. (1871) 45 N. Y. 451; Marie *v.* Garrison (1880) 83 N. Y. 14; Mahaney *v.* Carr (1903) 175 N. Y. 454, 67 N. E. 903; National Citizens' Bank *v.* Toplitz (1904) 178 N. Y. 464, 71 N. E. 1; Levin *v.* Dietz (1909) 194 N. Y. 376, 87 N. E. 454; Riker *v.* Comfort (1910) 140 App. Div. 117, 124 N. Y. Supp. 1106; Goodyear *v.* Koehler Sporting Goods Co. (1913) 159 App. Div. 116, 143 N. Y. Supp 1046; Redican *v.* Interchangeable etc. Sign Co. Inc. (1914) 162 App. Div. 803, 146 N. Y. Supp. 596; Lynch *v.* Murphy (1913) 81 Misc. 180, 142 N. Y. Supp. 373.

which was necessary in order to accept the defendant's offer in accordance with its terms. On the other hand, there may be a legally binding contract which a court of equity will refuse to enforce because it cannot insure the defendant's receiving that in exchange for which his promise was given. Professor Pomeroy,[2] in stating the essential elements of the right to specific performance, says that the contract to be specifically performed "must be in general mutual in its obligation and its remedy". He uses similar language in his book on Specific Performance of Contracts, and in this he follows substantially the statement of the doctrine of mutuality of remedy as it appears in Lord Justice Fry's treatise on Specific Performance.[3] This statement of Pomeroy's has often been made the basis of judicial decision, and has been repeatedly cited with approval by the New York courts,[4] but like many other attempts at the formulation of a rule of law, without giving any clue to the reason of the rule, this statement has been most mischievous in its influence upon judicial decisions.

Assuming a valid legal contract, free from fraud or duress or other unfairness in its formation, for the breach of which legal damages would be inadequate, why should equity set any limits upon its authority to compel specific performance? Obviously courts of equity, which are courts of conscience, do not recognize the moral or legal right of one who is a party to such a contract not to perform it. If, therefore, equity withholds its hand from compelling performance of the contract because of the mutuality rule, it does so not because it recognizes the right on the part of either party not to perform his contract obligation, but because of expediency or because it would do some injustice to the defendant by compelling him to perform his contract.

If a plaintiff sues at law for breach of contract, he seeks damages only, and his damage in general is measured by finding the difference in money value between the performance which he is entitled to receive from the defendant under his contract and its

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[2]Pomeroy, Equity Jurisprudence (Stud. Ed.) § 1405. It is only fair to state that this statement has been taken more literally by the courts than the author probably intended. See Pomeroy (2nd Ed.), Specific Performance § 165.

[3]Fry, Specific Performance (3rd Am. ed.) § 440.

[4]Palmer *v.* Gould (1895) 144 N. Y. 671, 39 N. E. 378; Stokes *v.* Stokes (1896) 148 N. Y. 708, 43 N. E. 211; Mahaney *v.* Carr (1903) 175 N. Y. 454, 67 N. E. 903; Ide *v.* Brown (1904) 178 N. Y. 26, 39, 70 N. E. 101; Wadick *v.* Mace (1908) 191 N. Y. 1, 5, 83 N. E. 571; Levin *v.* Dietz (1909) 194 N. Y. 376, 87 N. E. 454; Riker *v.* Comfort (1910) 140 App. Div. 117, 124 N. Y. Supp. 1106.

reasonable cost if he procures the performance or a similar performance from another. But if the plaintiff is entitled to resort to equity for specific performance, the court will give him, so far as possible, the complete performance of the defendant's obligation. It is apparent that a court of equity would do an injustice to a defendant if it compelled him to perform his contract, and if at the same time for any reason it could not or would not compel the plaintiff to perform the contract on his part, and thus left the defendant who had been compelled to perform his contract, to his remedy at law for damages on the contract. If, on the other hand, the defendant has received that which he is entitled to receive under his contract either because the plaintiff has performed his promise, or for the reason that the consideration given by the plaintiff for the defendant's promise is doing or giving something instead of promising to do or give something, or whenever the court can compel the plaintiff to do that which he has contracted to do, then in such case there is no want of mutuality of remedy as that rule has been developed by courts of equity.

Inability of the court to compel the plaintiff to perform may arise either because the plaintiff is not unconditionally bound by his contract, as it is in the case of infants' contracts, because of impossibility of performance by the plaintiff, as in the case of a vendor who is unable to make good title, or because of the equity rule that the court will not, on the grounds of expediency, compel the performance of contracts involving continuous acts or personal service. For example, equity would not compel an artist to paint a picture in return for a conveyance of real estate by the defendant. The practical inability of a court to compel the artist to perform his contract will result in the court's refusing to take jurisdiction, thus leaving the parties to the contract to their remedy at law. To compel the vendor to convey when the court cannot compel the vendee to perform would work a greater injustice than for equity to withhold the remedy altogether.

There is want of mutuality of remedy, then, when and only when the court is unable, for any reason, to insure the defendant's receiving that which he is entitled to receive in exchange for the performance of his own promise. Or, stated in somewhat different form, a court of equity will not compel a defendant to perform his contract if it must leave him to pursue his remedy on the contract for legal damages.[5]

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[5]See 3 Columbia Law Rev. 1.

It is established by abundant authority in nearly every jurisdiction that the rule that in equity the remedies on a contract must be mutual has nothing to do with mutuality of obligation. If there is a legal contract, and equity, by its decree, can leave it fully performed on both sides so that each party has received that which he was entitled to receive under his contract, then there is no want of mutuality, and the court should exercise its jurisdiction to compel the performance of the obligation created by the contract.

The rule in equity that the remedies upon contract must be mutual thus explained, is not in any sense an artificial or technical rule, but finds its justification in the plainest dictates of morality and good sense. This has been recognized by many decisions of the New York courts. Thus, following the current of authority in other jurisdictions, they have held that when one party to a contract for the sale of land has not signed the memorandum of sale, the other may, nevertheless, procure a specific performance of the contract.[6] By serving his complaint and asking the court to compel the defendant to perform his contract, the plaintiff submits to the jurisdiction of the court, and may be compelled to perform the contract on his part. There is thus no want of mutuality of remedy, and the court will compel specific performance of the whole contract. While there was a lack of mutual obligations in the sense that the plaintiff could have successfully resisted specific performance, had the action been brought against him by the defendant suing as a plaintiff, by pleading the Statute of Frauds, nevertheless, since the court can give to the defendant all that he is entitled to receive under the contract, want of mutuality is not available to him as a defence. In the same way a principal whose agent has exceeded his authority in entering into a contract may entitle himself to relief in equity by ratifying his agent's act.[7] Or a plaintiff who stipulated that upon the happening of a certain contingency he should not be bound may nevertheless waive the stipulation and by bringing his action entitle himself to specific performance.[8]

It would follow that an infant who, as a defendant, could plead his infancy may, on coming of age, file his bill for specific perform-

[6]Mason *v.* Decker (1878) 72 N. Y. 595; Mutual Life Ins. Co. *v.* Stephens (1915) 214 N. Y. 488, 108 N. E. 856; Codding *v.* Wamsley (1874) 1 Hun 585, aff'd. (1875) 60 N. Y. 644; Pettibone *v.* Moore (1894) 75 Hun 461, 27 N. Y. Supp. 455; Clason *v.* Bailey (N. Y. 1817) 14 Johns. *484, *489; M'Crea *v.* Purmort (N. Y. 1836) 16 Wend. 460.

[7]Catholic etc. Society *v.* Oussani (1915) 215 N. Y. 1, 8, 109 N. E. 80, 82.

[8]Catholic etc. Society *v.* Oussani, *supra.*

ance. There is, then, no want of mutuality, since by bringing action the contract has been ratified, and since the court, by its decree may give to the defendant all that he is entitled to receive under his contract; and the defendant cannot complain at being compelled to perform his contract. While no case has been found in New York applying this doctrine, it has the support of authority in other jurisdictions.[9] In the same way, the contract vendor whose title is unmarketable, cannot be compelled to perform. But if before the date set for the performance of his contract or indeed before he is barred by laches or the statute of limitations, he perfects his title, he may compel the vendee to perform specifically his contract.[10] Indeed, where there is a deficiency in the quantity of the subject matter of the contract, or even a defect in title, which is not substantial, the court may, in its discretion, compel specific performance, allowing to the defendant a suitable deduction from the purchase price.[11]

Upon like principle, where the plaintiff's performance of his contract involves personal service, or the doing of continuous acts, performance of which a court of equity could not or would not compel, it may, nevertheless, compel the defendant to perform when the contract has been fully performed by the plaintiff. That the plaintiff is no longer under a contract obligation to the defendant is and should be immaterial, since the defendant, having received all that he is entitled to receive under the contract, has no moral or legal ground for resisting performance on his part.[12]

In each of these classes of cases, it should be observed that the requirement of the mutuality rule, as stated by Pomeroy, if taken literally, namely that there must be mutuality of obligation and remedy, was not satisfied.

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[9]Clayton *v.* Ashdown, 9 Vin. Abr. 393, G. 4 *Plac.* 1.

[10]Bruce *v.* Tilson (1862) 25 N. Y. 194; Jenkins *v.* Fahey (1878) 73 N. Y. 355; see Blakslee Mfg. Co. *v.* Blakslee's Sons Iron Wks. (1891) 129 N. Y. 155, 29 N. E. 2; Reformed etc. Church *v.* Mott (N. Y. 1838) 7 Paige Ch. 77. The opposite view followed in a few jurisdictions see Norris *v.* Fox (C. C., N. D. Mo. 1891) 45 Fed. 406; Luse *v.* Deitz (1877) 46 Iowa 205, has been justly criticized. See Dresel *v.* Jordan (1870) 104 Mass. 407, and must be regarded as exceptional. See 1 Ames Cases on Equity 326 n. 5; Butts *v.* Genung (N. Y. 1835) 5 Paige Ch. 255.

[11]See Palmer *v.* Gould (1895) 144 N. Y. 671, 39 N. E. 378; Smyth *v.* Sturges (1888) 108 N. Y. 495, 15 N. E. 544; Merges *v.* Ringler (1898) 34 App. Div. 415, 422, 54 N. Y. Supp. 280; King *v.* Bardeau (1822) 6 Johns. Ch. 38, 44; Winne *v.* Reynolds (1837) 6 Paige Ch. 407; Keating *v.* Gunther (1890) 10 N. Y. Supp. 734.

[12]Howe *v.* Watson (1901) 179 Mass. 30, 60 N. E. 415; 1 Ames Cases on Equity 430, n. 3.

The position of the parties to a bilateral contract where the plaintiff has performed on his part, the defendant's promise remaining executory, is precisely the same as in the case of a unilateral contract where the plaintiff has done something or given something in exchange for the defendant's promise. That the plaintiff's act is not preceded by an obligation on his part to do it should not affect the moral or legal obligation of the defendant to do that for which he has been compensated by the plaintiff; and so are the authorities, in those jurisdictions where the question has arisen.[13]

It has remained for the courts of New York, however, following literally the passage quoted from Fry and Pomeroy, to give countenance to a supposed rule that there can be no specific performance of a unilateral contract because, notwithstanding the fact that the plaintiff has given or tendered to the defendant exactly that which the defendant is entitled to receive in return for his promise, there is want of mutuality of obligation which should prevent equity's exercising any jurisdiction over the contract.

This supposed rule seems to have originated with the case of *Stokes* v. *Stokes*.[14] In this case the defendant sought to enforce by way of counter-claim an agreement on the plaintiff's part to deposit with defendant certain bonds which it was claimed the plaintiff had agreed to give the defendant as security for an indebtedness of the plaintiff to the defendant. The agreement recited that defendant was to purchase from one *R* 1963 shares of the stock of a corporation in which the plaintiff and defendant were already interested as stockholders "or a portion thereof with the

[13] 1 Ames Cases on Equity 430 n. 3, 431 n. 2. In fact in New York, courts of equity have not hesitated to enforce a voluntary promise to convey land where in reliance upon it the promisee occupied the land and made improvements. Freeman *v.* Freeman (1870) 43 N. Y. 34; Young *v.* Overbaugh (1895) 145 N. Y. 158, 39 N. E. 712; Messiah Home *v.* Rogers (1914) 212 N. Y. 315, 106 N. E. 59. In such a case the promisee is obviously under no obligation, and indeed, there is no contract, the jurisdiction arising from the conduct of the defendant in inducing the plaintiff to occupy the premises and improve them in reliance upon the defendant's promise and to prevent the latter's unjust enrichment.

[14] (1896) 148 N. Y. 708, 43 N. E. 211; but see the language of the opinion in Palmer *v.* Gould (1895) 144 N. Y. 671, 677, 39 N. E. 378. As was pointed out however in Catholic etc. Society *v.* Oussani (1915) 215 N. Y. 1, 8, 109 N. E. 80, 82, the opinion of Gray J. in that case was not adopted by the court and all that was actually decided was that the case was not a proper one for partial performance with compensation. Chancellor Kent seems to have thought that the mutuality rule in equity required mutuality of obligation, Benedict *v.* Lynch (1815) 1 Johns. Ch. 370, 373, but in Clason *v.* Bailey (N. Y. 1817) 14 Johns. *484, *487, he recognized that the rule was the other way saying at *490: "It appears from the review of the cases that the point is too well settled to be now questioned."

intent that they may together be the owners of the whole of the stock of said corporation"; and the agreement stipulated "that the defendant agrees to sell and transfer one half of or the whole of said portion of said 1963 shares of common stock as he may purchase from said" *R* upon terms which were set out at length by the contract. After the execution of the contract the defendant purchased 500 shares of the stock of *R* but was unable to purchase any more. The plaintiff failed to deposit the bonds with defendant as security and the stock purchased by the defendant had not been transferred to plaintiff, but so far as appears, the contract had in all other respects been performed by the parties. Obviously the sole question before the court was one of interpretation. Had the defendant, by purchasing 500 shares of stock from *R* and by obligating himself to transfer one half of it to the plaintiff done such acts as rendered obligatory the plaintiff's obligation to deposit the bonds under the agreement? This depended upon the true interpretation of the contract. If the defendant had procured a sufficient amount of the stock to render the plaintiff's promise operative, then the defendant was entitled to have the plaintiff perform his contract, and this irrespective of whether the defendant was in the first instance bound to purchase the stock or not. The majority of the court did indeed rest its decision in part upon the ground that the true meaning of the contract was that the defendant was required to purchase a more substantial proportion of the outstanding stock than 500 shares, in order to entitle him to the plaintiff's performance of his contract. But not content with this basis of decision, the court rested its decision upon the rule as stated by Pomeroy. After commenting on the fact that the plaintiff was not bound to purchase the stock of *R*, the court said,[15] "A contract must possess certain elements in order that a court of equity may exercise jurisdiction to compel its performance. It must be upon valuable consideration; it must be reasonably certain as to its subject matter, its stipulations, its purposes, its parties, and the circumstances under which it was made. It must be in general mutual in its obligations and its remedy." In short, as applied to the facts of this case, the plaintiff who had done precisely the thing which entitled him to the defendant's performance, was held, nevertheless, not entitled to the aid of a court of equity, because the plaintiff was not originally bound to give that which he had actually given in exchange for the defendant's promise.

[15] 148 N. Y. 708, 716, 43 N. E. 211.

This doctrine, as announced in *Stokes* v. *Stokes*, has received the sanction of judicial approval in several later cases, but it did not receive its logical application until the decisions in *Wadick* v. *Mace*[16] and *Levin* v. *Dietz*.[17]

In *Wadick* v. *Mace* the defendant, the vendor of real estate, had stipulated in the contract of sale that in the event of default by the vendee the vendor's right on the contract should be limited to retaining the one thousand dollars of deposit money paid by the vendee to the vendor. The court, quoting the statement of the mutuality rule from Pomeroy, that a contract must be "mutual in its obligation and in its remedy," in order to warrant a decree for specific performance, held that since the vendor had waived his right of specific performance against the vendee there was want of "mutuality" in the contract and that specific performance should not be granted. In reaching this result the court proceeded on the assumption that there could be no specific performance in favor of the plaintiff, unless the defendant, suing as a plaintiff, could have compelled specific performance by the other party to the contract, who in this case was the plaintiff-vendee.

The court also suggested that the provision waiving specific performance in favor of the vendor was inserted with knowledge of the rule which requires mutuality of remedy as the basis of a suit to enforce specifically a contract and that therefore the vendor, in relinquishing the right to an equitable remedy against the vendee "assumed that her action in so doing necessarily involved its relinquishment on the part of the vendee."

As we have seen, neither the mutuality rule nor the reason for the rule denies to every plaintiff the right to specific performance merely because he could not be subjected to such an action by the other party to the contract. Here the defendant was legally bound by his contract and the plaintiff legally entitled to have the defendant perform it. Because the defendant had expressly waived the right to have the plaintiff specifically perform, it cannot be inferred that the plaintiff waived or intended to waive such a right on his part, or if inferred the inference must rest on the stipulation of the parties and not the rule that in equity the remedies must be mutual. To assume that the parties to the contract had such familiarity with the doctrine of mutuality that they must have intended by the waiver of the right to specific performance

[16](1908) 191 N. Y. 1, 83 N. E. 571.

[17](1909) 194 N. Y. 376, 87 N. E. 454.

on the part of one of the parties to waive it for both is to assume a knowledge on their part of an application of the rule which had not previously been made in the State of New York, and that they had a better knowledge of the mutuality rule than the Appellate Division, whose judgment was reversed by the Court of Appeals.

Legally and morally, therefore, the plaintiff was entitled to the benefit of his contract, and there is no principle either of equity or sound morals, which should deprive him of it, provided equity could compel the plaintiff to give to the defendant all that he was entitled to receive under his contract. And this the court was in a position to do. By filing his bill and asking the performance of the contract and asserting his willingness to carry it out, he waived the stipulation reserved in his favor and subjected himself to the jurisdiction of the court, and this was sufficient to enable the court to enter its judgment against the plaintiff as well as the defendant.[18] In any case, where the defendant is unconditionally bound, tender of performance by the plaintiff is not necessary to enable plaintiff to maintain his action for specific performance. The service of his complaint alleging his willingness to perform is sufficient.[19]

A consequence of this decision if its reasoning be followed is that parties to a contract over which equity would otherwise have jurisdiction may not, however obvious their intention and however explicit their language, reserve the right to specific performance to one party and waive it for the other. A rule which thus does violence to the intention of the parties to a contract without some controlling reason resting in positive law or morals, should not commend itself to "a court of conscience".

Had the stipulation waiving the right to specific performance been reserved for the benefit of the vendor a very different question would have arisen. In such a case the vendee would have no right to specific performance against the vendor, and the vendor could not therefore for any purpose be regarded as the trustee of the legal title for the vendee or as a quasi-mortgagee of the vendee. He therefore comes into court, not as the holder of the legal title, subject to equitable obligations, and therefore

[18]Catholic etc. Society *v.* Oussani (1915) 215 N. Y. 1, 109 N. E. 80.

[19]Jenkins *v.* Fahey (1878) 73 N. Y. 355; Baldwin *v.* Salter (N. Y. 1840) 8 Paige Ch. 473; Stevenson *v.* Maxwell (1849) 2 N. Y. 408; Bruce *v.* Tilson (1862) 25 N. Y. 194; Freeson *v.* Bissell (1875) 63 N. Y. 168; see Thomson *v.* Smith (1875) 63 N. Y. 301, 304.

entitled to the aid of the court of equity to adjust his rights and obligations with respect to the vendee,[20] but as a plaintiff seeking the payment of money only. A court having no jurisdiction over the contract obviously does not acquire it merely because the plaintiff seeks its aid, and here the element essential to jurisdiction, namely a legal title held subject to an equitable obligation is wanting. When the situation is reversed, the plaintiff-vendee is entitled to call for a conveyance. Legal damages are inadequate and the court therefore has jurisdiction and ought to exercise it, unless a proper application of the mutuality rule prevents.

In *Levin* v. *Dietz*[21] defendant offered in writing to convey to the plaintiff a sufficiently described plot of real estate upon payment to defendant of a specified sum of money. At the time and place named in the offer the plaintiff tendered to the defendant the amount called for by the offer. His tender was refused, whereupon he brought his action for specific performance of the contract. The court denied any relief to the plaintiff because of want of mutuality in the contract, using the term mutuality in both of the senses to which reference has been made.

The court raised the question whether there was any contract binding the plaintiff to buy the land in question, and if there was a contract, whether a court of equity at the suit of the plaintiff not so bound by it would enforce performance by his adversary, the court saying, page 378, "We think that both these questions must be answered in the negative and that it must be held that the respondents were not under any obligation to buy appellant's land, and that therefore there was lack of consideration for the latter's contract and lack of that mutuality of obligation, which are both essential to the successful prosecution of the action."

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[20]This, it is believed, is the real basis of the right of a vendor to have specific performance, a right sometimes expressed by the formula that the "remedies must be mutual and when a bill will lie for the purchaser it will also lie for the vendor". Adderley *v.* Dixon (1823) 1 Sim. & S. 607; Crary *v.* Smith (1848) 2 N. Y. 60; see Rindge *v.* Baker (1874) 57 N. Y. 209, 219; Baumann *v.* Pinckney (1890) 118 N. Y. 604, 612, 23 N. E. 916.

Where the plaintiff has a right to specific performance because and only because the defendant has a right of specific performance against the plaintiff, the "mutuality" is to be distinguished from mutuality of remedy as it has been defined in this article. In the previous case "mutuality" is a ground for the exercise of jurisdiction, in the latter, it is a reason for refusing to exercise it. Obviously one could not resort to equity to collect the purchase price of a unique chattel after delivery of the chattel to the vendee or of land after conveyance. See Jones *v.* Newhall (1874) 115 Mass. 244; 3 Columbia Law Rev. 1.

[21](1909) 194 N. Y. 376, 87 N. E. 454.

If the defendant's promise to convey the land was without consideration there was obviously no contract and no question of the mutuality of equitable remedy was involved. As has already been pointed out, where the offer calls for a promise, both parties must be bound by the contract if it comes into existence. If there is want of mutuality of obligation there is no contract. But it does not follow that there can be no contract without mutuality of obligation. Where the offer calls for the doing of an act exclusively and the offeree performs the act, the contract comes into existence, although the offeree never became obligated to perform it. It is obvious, therefore, that in *Levin* v. *Dietz* the mutuality of obligation necessary under certain circumstances to the formation of a contract, was not involved, since the offer at most contemplated the formation of a unilateral contract by the doing of an act on the plaintiff's behalf, and not by his promising to do it. Whether the plaintiff did or did not pay the money to the defendant, he was not under any circumstances to incur any obligation to pay it.

That one may acquire rights under a contract without becoming himself bound by it is too well settled in this state to require any extended comment.[22] If, for example, the defendant had received the money, it cannot be believed that any court would have denied to the plaintiff relief, although obviously there would have been no mutuality of obligation. The first question involved, then, in *Levin* v. *Dietz* was whether the plaintiff's act was such an act as constituted an acceptance of the defendant's offer and was therefore sufficient to create a contract.

Unquestionably, if the plaintiff had paid and the defendant had accepted the money, a contract would have arisen for breach of which the defendant would have been liable in damages. But wherever an act is necessary to establish a right at law in favor of the plaintiff, tender of the act and its refusal by the defendant is equivalent to the performance of the act. It is a familiar rule that an offer to sell personal property followed by a tender of the purchase price, or an offer to purchase followed by a tender of the chattel is all that is necessary to create a contract for breach of which legal damages may be recovered, and indeed,

[22] L'Amoreux *v.* Gould (1852) 7 N. Y. 349; Willets *v.* The Sun Mut. Ins. Co. (1871) 45 N. Y. 45; Pierson *v* Morsch (1880) 82 N. Y. 503; Marie *v.* Garrison (1880) 83 N. Y. 14; Todd *v.* Weber (1884) 95 N. Y. 181; Roberts *v.* Cobb (1886) 103 N. Y. 600, 9 N. E. 500; National Citizens' Bank *v.* Toplitz (1904) 178 N. Y. 464, 71 N. E. 1; Robb *v.* Wash. & Jeff. College (1905) 103 App. Div. 327, 93 N. Y. Supp. 92.

in New York the tender is sufficient to pass the title and enable the vendor to sue for the purchase price or for the vendee to maintain replevin or trover for his goods.[23] Because of the necessity for a formal conveyance to pass title to real estate, tender of the purchase price, as in *Levin* v. *Dietz*, could not result in the title's passing, as in the case of chattels, but on principle and authority, it is sufficient to complete a contract so far as to entitle the plaintiff to recover damages for its non-performance. It has long been established that an option to purchase real estate upon the payment of a specified sum is enforceable by the option-vendee if he tenders the amount within the time fixed by the option,[24] and until the decision in *Levin* v. *Dietz* this was apparently the rule in New York;[25] but in such a case the option-vendee is neither bound to exercise the option nor bound to pay the purchase price if its tender is rejected.

If, then, it be assumed that a legally binding unilateral contract for the sale of land may be entered into by the tender of the purchase price in accordance with the terms of the offer, is there such want of mutuality of equitable remedy in such a case as to lead a court to deny to the vendee specific performance of the contract? In answering this question, it should be borne in mind that the plaintiff is legally entitled to the benefit of his contract, for if this assumption be not made then there is no contract, and the doctrine of mutuality of equitable relief is inapplicable. Legal damages are inadequate, since the subject matter of the contract is real estate and the defendant's promise to convey is one, the specific performance of which equity is able to compel.

It would be difficult to discover any sound reason, either in law or morals, for denying to the plaintiff the remedy of specific performance in such a case if the court is able to give to the defendant the purchase money in return for the defendant's performance. It is not sufficient to say that the plaintiff is not bound by the contract. This certainly would be no answer if the plaintiff had paid and the defendant had received the purchase money, nor should it be an answer where the defendant refuses it. The

[23]Hayden *v.* Demets (1873) 53 N. Y. 426; see Murphy *v.* Hofman Co. (1915) 215 N. Y. 185, 109 N. E. 101; see also Brinley *v.* Nevins (1914) 162 App. Div. 744, 147 N. Y. Supp. 985; Fiske *v.* Batterson (1914) 165 App. Div. 952, 150 N. Y. Supp. 242; Gordon Malt'g. Co. *v.* Bartels Brew'g. Co. (1912) 206 N. Y. 528, 100 N. E. 457; Justice *v.* Wheeler (1870) 42 N. Y. 493.

[24]See 1 Ames Cases on Equity 431 n. 2, 432 n. 4.

[25]Matter of Hunter (1831) 1 Edw. Ch. 1; and see Rockland-Rockport Lime Co. *v.* Leary (1911) 203 N. Y. 469, 97 N. E. 43.

plaintiff, by submitting himself to the jurisdiction of the court, or by keeping his tender good, gives the court authority to direct the plaintiff to pay the purchase price in exchange for the conveyance by the defendant. This is precisely what the court does in those cases where the defendant but not the plaintiff has complied with the Statute of Frauds, or where an infant party to a contract has filed his bill for specific performance after becoming twenty-one years of age, or where the plaintiff is the assignee of the right of a vendee to recover a judgment for specific performance where the assignee either joins his assignor as a party-defendant, or offers in his bill to pay the amount of the purchase money.[26] In every case where a court enforces an option for a unilateral contract to sell land the plaintiff entitles himself to the relief by tendering the amount stipulated for by the option and offering in his bill to pay the amount upon receiving a conveyance.[27] In each of these cases, although the plaintiff was under no obligation to perform the contract, want of mutuality was removed by filing his bill. The court was then in a position to compel the defendant to perform his contract without imposing any injustice on him, as is the case where there is a true want of mutuality of remedy. An exactly similar jurisdiction is exercised by equity when a mortgagor who has not given a bond or promised to pay a debt for which the mortgage is security, is permitted to redeem from the mortgagee. Although not obligated to pay the mortgage, equity, nevertheless, permits him to redeem from the mortgagee if he submits to the jurisdiction of the court and under its direction pays the amount due. The jurisdiction, it is true, is referable to the jurisdiction which equity exercises over the mortgage relation, but in the case of a unilateral contract for the sale of land, the jurisdiction arises from the inadequacy of legal damages. Want of mutuality of remedy does not deprive a court of its jurisdiction, but is addressed only to the discretion of the court.[28] In *Levin* v. *Dietz*, therefore, the court might have

[26]See Freeson *v.* Bissell (1875) 63 N. Y. 168; Thomson *v.* Smith (1875) 63 N. Y. 301, 304; Wass *v.* Mugridge (1880) 128 Mass. 394.

[27]See note 24 ante.

[28]See Standard Fashion Co. *v.* Siegel-Cooper (1898) 157 N. Y. 60, 51 N. E. 408; Butler *v.* Wright (1906) 186 N. Y. 259, 78 N. E. 1002. This is the proper explanation of the rule that equity will in a proper case allow a plaintiff in default as to the subject matter of the contract to obtain specific performance of the contract with compensation to the defendant Smyth *v.* Sturges (1888) 108 N. Y. 495, 15 N. E. 544, and note 12 ante; and of the jurisdiction which equity exercises in enforcing a negative term of a contract when it cannot or will not enforce the affirmative. See note 40, post.

given a conditional decree, directing the defendant to perform within a specified time if the plaintiff should pay the stipulated price, or it might have directed the plaintiff to pay the purchase price concurrently with the defendant's performance.

The result would have been the exact performance of the contract in accordance with its terms, in accordance with the legal and moral obligation of the defendant, and without injustice to him. To deny relief in such a case upon the basis of a supposed technical rule, unsupported by positive reason or policy, invoked by a defendant to shield himself from the consequences of the wilful breach of his contract, is an inversion of the function of a court of equity.

There is singularly little authority on the precise point involved in *Levin* v. *Dietz*. The Massachusetts court, however, has held in a case identical in its facts with those of *Levin* v. *Dietz*, that the plaintiff was entitled to specific performance;[29] and in *Baumann* v. *Pinckney*,[30] a case which does not seem to have been brought to the attention of the court in *Levin* v. *Dietz*, a different view on this question was taken. In this case a contract had been entered into for the sale of land, which by its terms would expire by default of the vendee before a certain date. The vendor gave to the vendee an oral option to extend the time of the performance and to purchase at an increased price if the vendee at the time and place specified in the contract for closing the title would make a further payment of $10,000 on account of the purchase price. The vendee attended, at the time and place named, ready to tender the $10,000, but no actual tender was made. The court held that under the circumstances of the case an actual tender of the $10,000 was waived by the vendor, that the plaintiff-vendee was therefore in the same position as if a proper tender had been made, and consequently was entitled to a specific performance of his contract. In disposing of the case the court proceeded on the theory that the option to "extend" the contract to purchase at a new price was in effect an offer which the plaintiff-vendee had accepted and that the vendor was bound to perform, although the vendee was not bound to tender the additional $10,000, nor, indeed, was he bound to purchase after he had tendered the additional $10,000.

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[29]Boston & Me. R. R. *v.* Bartlett (1849) 57 Mass. 224.

[30](1890) 118 N. Y. 604, 23 N. E. 916.

The case is not distinguishable in principle from *Levin* v. *Dietz*. The offer to "extend" the time of performance and to sell at a higher price could be accepted only by tender of the amount specified. Assuming, as the court did, that the plaintiff was in the same position as if he had tendered payment, the resulting obligation was unilateral as was that in *Levin* v. *Dietz*. The court, however, found no difficulty in awarding specific performance, and taking the view of the court that there was a contract without a tender on the plaintiff's part, it cannot be said that any injustice was done by giving the plaintiff the benefit of his contract.

A logical application of the decision in *Levin* v. *Dietz* would result in holding that an option for the purchase of land given for good consideration which contemplates the exercise of the option by the tender of a payment of money by the vendee to the vendor is not enforceable in equity, since the option vendee is under no obligation to exercise his option or to pay the purchase money if his tender of it is refused by the vendor. The same reasoning which denied mutuality of remedy in *Levin* v. *Dietz* would deny it in an option contract, although it is possible for the court to make a decree which would leave the contract fully performed and do complete justice between the parties. That such contracts are enforceable in equity is established by authority outside of New York,[31] and it is not probable that the New York courts will apply the doctrine of *Levin* v. *Dietz* to option contracts.

In the *Matter of Hunter*,[32] cited in *Levin* v. *Dietz*, such an option was enforced, the court expressly pointing out that there might be mutuality of remedy without mutuality of obligation, saying:[33]

"The court may, therefore, in a proper case, when there is a covenant on one side and no mutuality, decree a performance."

Indeed, in *Bullock* v. *Cutting*,[34] the court granted specific performance of an option in a lease to sell the leased premises to the lessee for a sum named in the lease. In this case it was held that no tender of the amount specified was necessary where the

[31] 1 Ames Cases on Equity 431 n. 2, 432 n. 4.
[32] (N. Y. 1831) 1 Edw. Ch. 1.
[33] At p. 5.
[34] (1913) 155 App. Div. 825, 140 N. Y. Supp. 686.

lessor had repudiated the option. The court nevertheless held that the plaintiff was entitled to have the option performed, saying, at page 830:

"The court of appeals could not have intended to hold in *Levin* v. *Dietz* that such contracts (options) were unilateral, and incapable of enforcement."

And again, in *Carney* v. *Pendelton*,[35] the court, although it considered the option when exercised as creating a bilateral contract, nevertheless felt called upon to say:[36]

"The learned counsel for the respondents claim, and the learned trial court seems to have held, that by two recent decisions of the Court of Appeals, this well established rule has been overthrown. (*Wadick* v. *Mace,* 191 N. Y. 1; *Levin* v. *Dietz,* 194 id. 376.)

"We do not so understand them. In *Wadick* v. *Mace* (*supra*) the decision was put on the ground that it affirmatively appeared from the written instrument that the remedy of specific performance was expressly waived, and in *Levin* v. *Dietz* (*supra*) the decision was put on the ground that there had been no acceptance of the vendor's promise to perform until after the promise had been withdrawn."

A recent decision of the Court of Appeals has shown a disposition of that court not to adhere strictly to the rule that the obligation of the contract must be mutual in order to entitle either party to specific performance. In *Catholic etc. Society* v. *Oussani*[37] an officer of the plaintiff-corporation, so far as appeared, without authority, had entered into a contract for the purchase of land. The contract contained a provision that unless a road running through the property proposed to be sold should be closed within one week, the plaintiff "should be in no way obliged." The court held that upon proper proof of the ratification of the contract the plaintiff would be entitled to specific performance of his contract, saying:[38]

"There may be an exception here to the general rule that mutuality must be judged as of the date of the contract, but if so, it is as well established as the rule itself."

While this case was not necessarily inconsistent with *Levin* v. *Dietz*, if the provision for the closing of the road be treated as

[35] (1910) 139 App. Div. 152, 123 N. Y. Supp. 738.

[36] At p. 153.

[37] (1915) 215 N. Y. 1, 109 N. E. 80.

[38] At p. 8.

a condition of the contract only, it does seem inconsistent with the decision in *Wadick* v. *Mace*, where the stipulation reserved in favor of the vendee that he should not be compelled to perform specifically his contract was held to deprive the vendor of the right of specific performance because there was want of mutuality.

The notion that the mutuality rule is in some way necessarily dependent upon an obligation on the part of the plaintiff is to be noted in New York in a certain class of cases dealing with contracts involving personal employment or service, where the plaintiff being under no obligation to employ or serve the defendant is, nevertheless, entitled by the terms of his contract to call upon the defendant to refrain from rendering services to others in like capacity.

The doctrine of the English courts established in *Lumley* v. *Wagner*,[39] that one who employs another whose services are unique, and stipulates that the person employed shall not serve others during the term of the contract, may enforce the negative term of the contract by injunction, is accepted in New York,[40] although in granting an injunction in such cases the courts clearly have created an exception to the general rule that the remedies on the contract must be mutual. Since the court cannot compel the defendant to perform the affirmative part of the contract, it will not compel the plaintiff to perform his part of the contract, and it must necessarily leave a substantial part of the contract unperformed by its decree. Where, however, the plaintiff has fully performed the contract on his part, he is entitled, irrespective of any want of mutuality, to have so much of the defendant's contract performed as the court is able to direct, even though it be less than full performance. Thus, it is not open to question that if *A* paid a sum of money to *B*, a celebrated artist, to perform in *A's* theatre and not to perform in a rival theatre for a specified time, *A* assuming no other obligation, there would be no violation of the mutuality rule, and no failure of justice if the court restrained *B* from singing for the rival theatre, although it could not compel *B* to sing for *A*. *A* having fully performed, is entitled to have such performance as the court can give, although it may be less than complete performance of *B's* contract.

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[39](1852) 1 DeG. M. & G. *604.

[40]Duff *v.* Russell (1891) 60 N. Y. Super. Ct. 80, 14 N. Y. Supp. 134, aff'd. 133 N. Y. 678, 31 N. E. 622; Hayes *v.* Willio (1871) 11 Abb. Pr. (N. S.) 167; see Arena Ath. Club *v.* McPartland (1899) 41 App. Div. 352, 58 N. Y. Supp. 477; Canary *v.* Russell (1894) 9 Misc. 558, 30 N. Y. Supp. 122; Roosen *v.* Carlson (1899) 46 App. Div. 233, 235, 62 N. Y Supp. 157.

In *Star Co.* v. *Press Publishing Co.*,[41] the plaintiff employed one of the defendants at a fixed annual salary for five years, to draw illustrations to be published in plaintiff's newspaper, he contracting not to draw illustrations for any rival newspaper during the five years. But the contract contained a stipulation that neither party to it should be bound to perform the affirmative only at his option after the first three years of the contract. At the expiration of three years plaintiff, as was its right under the contract, declined to employ the defendant longer and brought its action to restrain the defendant from drawing illustrations for a rival newspaper.

It will be observed that both parties had fully performed the affirmative part of the contract, and that the only part of the contract remaining unperformed was the defendant's negative stipulation which, by the terms of the contract, was to survive the affirmative stipulations contained in it. The defendant therefore had received all that it was entitled to receive under the contract, but the plaintiff was still entitled to have the defendant perform the negative part of the contract. Nevertheless, the court refused an injunction on the ground that there was want of mutuality in the contract, the court saying, p. 489:

"In order to uphold an injunction in a case like the present there must be mutuality of obligation and there must also be an obligation on the part of the enjoined servant to render to the plaintiff the services which it is sought to prevent his rendering to another. In other words, the negative covenant not to render services to another will not be enforced in equity unless it is supported by a positive covenant to render services to the party seeking the injunction."[42]

And again the court said, at page 491, in analyzing the agreement:

"So when the agreement is reduced to its ultimate elements it will be found that at least for the two years from October,

[41] (1914) 162 App. Div. 486, 147 N. Y. Supp. 579.

[42] The court in Star Co. *v.* Press Pub. Co., *supra*, cited two cases as authority for this proposition. In one, Rice *v.* D'Arville (1894) 162 Mass. 559, 39 N. E. 180, the plaintiff was bound by his contract, but became financially unable to pay the defendant, whereupon, the defendant sought other employment in violation of the negative term of her contract. The court held that it would not aid the plaintiff by an injunction in view of his inability to perform on his part. In the other, Metropolitan Exhib. Co. *v.* Ward (1890) 24 Abb. N. C. 393, 9 N. Y. Supp. 779, the plaintiff which had employed the defendant as a baseball player "reserved" his services for the following summer on a salary of $3.000 per year and provided that the plaintiff might terminate the contract at any time on ten days' notice. It was held that a preliminary injunction would not be granted because the contract was not sufficiently definite or mutual.

1913, to October, 1915, it imposes no fixed and definite obligation upon Dirks to furnish drawings to plaintiff, or upon plaintiff to accept such drawings as Dirks might offer, and no obligation upon the plaintiff's part to pay Dirks anything unless he shall furnish drawings which are accepted. There is, therefore, nothing left except Dirks' negative covenant not to supply drawings to anyone except plaintiff, unsupported by any positive covenant * * * by plaintiff to accept and pay for such drawings as may be offered. The negative covenant under such circumstances is without consideration to support it and is enforceable by injunction."

That a court of equity may, in its discretion, refuse specific performance of a contract which unreasonably restricts a defendant from engaging in making a livelihood or which is harsh or grossly unfair in its terms, is well settled.[43] But these decisions are referable to the doctrine of hardship, which bears no relation to the mutuality rule. If, therefore, it be assumed that the contract in *Star Co.* v. *Press Pub. Co.* was fair and reasonable in its terms so as to preclude the exercise of the court's discretion in favor of the defendant to avoid hardship, then the mutuality rule should be no bar to the plaintiff's relief, since the defendant had received the full benefit of the plaintiff's performance. And there was no practical difficulty in the court's directing the performance of the negative term of the contract, which was the only part remaining unperformed by the defendant. A similar question was involved in *Winslow* v. *Mayo*,[44] in which the defendant contracted to employ the plaintiff to sell certain specified merchandise on commission, with a stipulation that if the defendant should receive an offer for all or part of the goods he should offer them to the plaintiff at the same price before accepting the offer from a third person. Although this stipulation was affirmative in form, it was in effect negative in substance, namely, a stipulation not to sell the merchandise to anyone without having offered it to the plaintiff.[45] The court refused its relief in part at least, because the plaintiff was not bound to render service to the defendant, and there was therefore a want of mutuality.

[43]Ehrman *v.* Bartholomew [1898] 1 Ch. 671; Dockstader *v.* Reed (1907) 121 App. Div. 846, 106 N. Y. Supp. 795; Witmark & Sons *v.* Peters (1914) 164 App. Div. 366, 149 N. Y. Supp. 642; but *cf.* McCall Co. *v.* Wright (1910) 198 N. Y. 143, 91 N. E. 516.

[44](1908) 123 App. Div. 758, 108 N. Y. Supp. 640.

[45]The court will always look through the form and ascertain whether in point of substance the contract involves a negative stipulation to refrain from doing something which it can enforce, Metropolitan etc. Supply Co. *v.* Grinder [1901] 2 Ch. 799, or whether it is affirmative, involving certain acts or personal services, which it will not enforce. Davis *v.* Foreman [1894] 3 Ch. 634.

As was said by Judge Lowell in *Singer, etc. Co.* v. *Union, etc. Co.*:[46]

"It is no doubt true in general that where only one side is bound to an agreement which remains wholly executory, a court of equity will not usually interfere to enforce the agreement against the party who is bound. The simplest case of this kind is where an infant is one party to a contract for the sale of land. The reason given is that the party who was not bound would enforce the contract if for his advantage, and repudiate it if the contrary. (*Lawrenson* v. *Butler*, 1 Sch. and Lef. 13.)

"The doctrine is often invoked in that class of cases, but there are innumerable cases where the party seeking the performance is no longer bound to anything, having paid the consideration in the outset, or performed his part; or where the plaintiff does not rest on a contract wholly executory, to which this doctrine does not apply. I have some doubt of its application in this case. Supposing the stipulation to mean what the defendants contend it does, that the complainant may renounce at any time, which may be doubted, still, if the defendants, for valuable consideration, have given the complainant an exclusive license until it forfeits it, I do not see why a court of equity should not protect that license by its injunction as usual, so long as it has not forfeited."

If, therefore, the plaintiff in *Winslow* v. *Mayo* had, by serving the defendant, entitled himself to performance of the defendant's promise to offer the merchandise to the plaintiff, and he had not forfeited that right by his refusal to perform for the defendant, the mere fact that the plaintiff was not bound to serve the defendant should not prevent the court's taking jurisdiction.

The same view was taken in *Redican* v. *Interchangeable, etc. Sign Co.*,[47] where the plaintiff asked specific performance of a contract, giving to him the exclusive sales agency of the defendant for five years, provided the plaintiff would, during four months, employ five salesmen to sell the products of the defendant outside of New York City. The complaint alleged and the answer admitted performance by the plaintiff for two months, whereupon defendant cancelled the contract. The court refused an injunction, in part on the ground that there was want of mutuality, because the plaintiff was not bound to act as agent. The court here might conceivably have refused relief on the ground that no contract had come into existence, and since the defendant's offer called for four months' service on the part

[46](C. C. 1st, 1873) Holmes 253.

[47](1914) 162 App. Div. 803, 146 N. Y. Supp. 596.

of the plaintiff, and the defendant had prevented the plaintiff from performing before the expiration of the four months, that then no contract had actually come into existence. But if it be assumed, as apparently many of the New York decisions do assume, that the defendant may not withdraw his offer when the plaintiff has once begun the performance of an act given in exchange therefor, which, if completed, would create a unilateral contract, then, obviously, there is no want of mutuality of remedy under the doctrine so ably stated by Judge Lowell, that the plaintiff should be entitled to an injunction protecting his license or exclusive right so long as it is not forfeited by his own act.

A different view, and one more consistent with principle, was expressed by the court in *Mutual Milk Co.* v. *Prigge*,[48] and in *Mutual Milk Co.* v. *Heldt*.[49] In the first of these cases the defendant, an employee of the plaintiff, agreed not to solicit customers of the plaintiff for three years after leaving the plaintiff's employ. The court issued its injunction, holding that the want of mutuality of obligation in the contract was no bar to a specific performance, although the court could not have compelled the plaintiff to employ the defendant or the defendant to serve the plaintiff. Still, when the affirmative contract of employment had been fully performed by the parties it constituted consideration for the defendant's negative stipulation and there was no want of mutuality of remedy in the contract. And in the second case, where the contract contained the same stipulation and also a stipulation that the plaintiff should not discharge the defendant except on one week's notice, and the plaintiff discharged the defendant without notice, but tendered one week's wages, it was held that the plaintiff was entitled to an injunction. The defendant having received the full benefit of his contract could not complain at being compelled to perform the negative stipulation by which he was bound.

Contrasting the cases hereinbefore referred to, in which specific performance has been granted, with those in which it has been denied on the ground of want of mutuality of equitable remedy, it seems apparent that in applying the rule, the courts of this State have misinterpreted it or at least lost sight of the reason upon which founded. As was said by Mr. Justice Romer,[50]

[48](1906) 112 App. Div. 652, 98 N. Y. Supp. 458.

[49](1907) 120 App. Div. 795, 105 N. Y. Supp. 661.

[50]Biggs *v.* Hoddinott [1898] 2 Ch. 307, 313.

"There is a great principle which I think ought to be adhered to by this court and by every court where it can possibly do so; that is to say that a man shall abide by his contracts and that a man's contracts should be enforced as against him."

This should be the cardinal principle of equity in exercising its jurisdiction over contracts wherever legal damages afford an inadequate remedy. The doctrine that the remedies must be mutual is one invented by the courts of equity to prevent the injustice which in many cases would result if the court should give specific performance against a defendant without at the same time insuring to the defendant the performance of the plaintiff's contract. To allow the defence upon any other ground, if the contract be fair and reasonable in its provisions, is to do an injustice to the plaintiff and to violate the principle of first importance that a man's contract should be enforced against him.

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TAXING INCOMES OF FOREIGN INVESTORS IN AMERICAN STOCKS AND BONDS.

Foreign investors are materially affected by the recent reversal by the Treasury Department of its ruling as to the taxability of incomes of non-resident aliens from bonds and stocks of corporations organized in the United States.

On March 21, 1916, the Commissioner of Internal Revenue ruled as follows:[1]

"Under the decision of the Supreme Court of the United States in the case of Brushaber *v.* Union Pacific Railway Company, decided January 24, 1916, it is hereby held that income accruing to non-resident aliens in the form of interest from the bonds and dividends on the stock of domestic corporations is subject to the income tax imposed by the Act of October 3, 1913."

This ruling expressly repeals a former Treasury Decision, which read as follows:[2]

"Interest on bonds of domestic corporations and dividends on stock of domestic corporations owned by non-resident aliens, and whether such bonds and stock be physically located within or without the United States, are not subject to the income tax."

It also repeals another Treasury Decision, which read as follows:[3]

"Interest from bonds and dividends on stock of domestic corporations, owned by non-resident aliens, are not subject to the income tax, whether such bonds and stock are physically located within or without the United States or whether they are in the possession of agents, or trustees in some fiduciary capacity, in the United States or otherwise."

The first ruling above mentioned states "that it will be held effective as of January 1st, 1916". About two weeks later, however, on April 4th, 1916, the Commissioner rendered a further decision, as follows (T. D. 2317):

"The provisions of Treasury Decision 2313 of March 21st, 1916, relative to withholding the normal tax of 1% at the source on income paid to non-resident aliens from corporate obligations will be held effective as of May 1st, 1916."

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[1] T. D. 2313.
[2] T. D. 2017.
[3] T. D. 2162.

At the request of numerous railroads and security investment houses, the Department held a hearing upon the new ruling on April 18th, 1916, and as a result of the protest there made, the time at which the provision regarding the withholding of the normal tax at the source is to become operative was further extended until July 1st, 1916.

Two interesting questions for the Courts are presented by this new ruling:

I. Is it intended by the Income Tax Law to tax incomes from stocks and bonds held by non-residents?

II. If that is the law's intent, has the United States the power to impose such a tax and if so, to what extent?

I.

The Law's Intent.

The language of the Law pertinent to this discussion is as follows:[4]

"and a like tax shall be assessed, levied, collected, and paid annually upon the entire net income from all property owned and of every business, trade, or profession carried on in the United States by persons residing elsewhere."

The reversing ruling is stated by the Department to be based on the authority of *Brushaber* v. *The Union Pacific R. R.*[5]

Comprehensive as was the decision in that case, the opinion in no way refers to non-resident aliens, the facts of the case did not present the question of the intent of the law or the power to impose a tax on such income, the matter was not referred to in the argument of counsel, and there was no attempt by the Supreme Court, either in this case or in any of the others which have been before it involving the present Income Tax Law, to pass upon those questions.

The original rulings of the Treasury Department that such income was not taxable were based upon two opinions of the Attorney-General addressed to the Treasury Department, one dated October 23rd, 1913,[6] and the other dated July 15th, 1914.[7]

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[4] 38 Stat. 166.

[5] (1916) 240 U. S. 1, 36 Sup. Ct. 236.

[6] 30 Op. Atty. Gen. 230.

[7] 30 Op. Atty. Gen. 273.

In the first of these the Attorney General said regarding the taxation of incomes from bonds:

"In substance, you wish to be advised whether, in pursuance of this paragraph (the above quoted sections of the law), the regulations which you are about to promulgate should direct the levying, assessing, and collecting of a tax upon the interest accruing upon bonds executed by a resident or citizen of the United States, whether secured by a mortgage or no, when such bonds are held or owned by a citizen or resident of a foreign country. Also, whether this tax should be levied upon the interest thereon where bonds executed by a non-resident foreigner, and secured by a mortgage on real estate in the United States, are held and owned by another non-resident foreigner.

I am of opinion that the quoted provision does not lay a tax upon the interest accruing on bonds of the character specified when held and owned by a non-resident foreigner, and that this is true irrespective of whether they are unsecured or secured by a mortgage upon real estate in this country, and also irrespective of where the written bonds are in fact kept or interest payments thereon are made."

In the second opinion the Attorney General said regarding the taxation of income from stocks:

"In my opinion, the mere receipt of dividends and income from domestic corporate stock by a non-resident alien, is not a 'business, trade, or profession carried on in the United States.' See *McCoach* v. *Minehill Railroad Co.* (1913), 228 U. S. 295.

"Your question is, therefore, in substance: Are shares of domestic corporate stock owned by non-resident aliens 'property . . . in the United States,' within the meaning of the above statute.

"The fact that property and its situs, in relation to the taxing power, have been frequent subjects of judicial interpretation by Federal and State courts, must be given weight in construing the intention of Congress in using the words above quoted.

"In *Covington* v. *First National Bank of Covington* (1905), 198 U. S. 100, 111, it had been held:

'The situs of shares of foreign-held stock in an incorporated company, in the absence of legislation imposing a duty upon the company to return the stock within the State as the agent of the owner, is at the domicile of the owner. Cooley on Taxation, 16.'

"A similar statement of the law is found in *Hawley* v. *Malden* (1914), 232 U. S. 1, 11, 12 (decided in January, 1914, within three months after the passage of the Income Tax Law):

'While the shareholder's rights are those of a member of the corporation entitled to have the corporate enterprise conducted in accordance with its charter, they are still in the nature

of contract rights or *choses in action*. Morawetz on Corporations, sec. 225. As such, in the absence of legislation prescribing a different rule, they are appropriately related to the person of the owner, and, being held by him at his domicile, constitute property with respect to which he is under obligation to contribute to the support of the Government whose protection he enjoys.'

"The courts having thus defined the situs of corporate stock for purposes of taxation, and a tax upon income being a direct property tax, *Pollock* v. *Farmers Loan & Trust Co.,* 158 U. S. 601 (the XVI Amendment [page 4] merely enlarging the powers of the United States, without changing the legal nature of the tax), it follows that Congress must be deemed to have used the words 'property . . . in the United States' as including only such forms of property as had a legal situs therein. I find in this statute no enactment taxing income from corporate stock in specific terms, and no appropriate language evincing any intention to fix by legislation the situs of such stock.

"The intention of Congress to impose a tax must be expressed in 'clear and unambiguous' language. *United States* v. *Isham* (1873), 17 Wall. 496, 504; *Eidman* v. *Martinez* (1902), 184 U. S. 578, 583; *Benziger* v. *United States* (1904), 192 U. S. 38, 55; *Spreckels Sugar Refining Co.* v. *McClain* (1904), 192 U. S. 397, 416; 23 Op. 62.

"In my opinion, therefore, shares of stock of domestic corporations owned by non-resident aliens are not 'property * * * in the United States' within the meaning of the act of October 3, 1913, and dividends accruing therefrom to such non-resident aliens are not subject to any tax under said act.

"This opinion is confined to a construction of the legal import and intent of the statute in question; and I express no opinion whatever as to the power of Congress, by appropriate legislation, to impose such a tax."

No new opinion from the Attorney General was received or asked for prior to the reversal by the Department of its previous ruling, and if either Mr. McReynolds, who rendered the opinion, or his successor, has changed his mind since the Brushaber case,[8] the change has not been publicly indicated, nor stated to the Treasury Department.

From a logical point of view the Attorney General's opinions are doubtless correct. Bonds and stocks as choses in action undoubtedly have a situs at the domicile of their owner and as property should have but a single location. Unfortunately, however, the courts have not consistently held that the domicil of the owner is their sole situs when questions of taxation are

[8]Brushaber *v.* The Union Pacific R. R. (1916) 240 U. S. 1, 36 Sup. Ct. 236.

involved. The cases which the Attorney General cites hold, it is true, that stocks of a corporation of a particular state have a situs and are taxable at the domicil of a non-resident owner, but they do not hold that they are not property anywhere else. In the case of *Hawley* v. *Malden*,[9] which the Attorney General cites, the opinion specifically indicates that the principle which it announces obtains only "in the absence of legislation prescribing a different rule," and goes on to say:[10]

"Undoubtedly, the State in which a corporation is organized may provide in creating it for the taxation in that State of all of its shares whether owned by residents or non-residents."

As a matter of fact legislation exists in many States which has the effect, according to the construction put upon it and sustained by the United States Supreme Court, of causing stocks of corporations organized in the State to have a situs there, though the owners are non-resident. For instance, the Supreme Court so construed a statute of Maryland in *Corry* v. *Baltimore*,[11] and the court said:

"That it was within the power of the State to fix, for the purposes of taxation, the situs of stock in a domestic corporation, whether held by residents or non-residents, is so conclusively settled by the prior adjudication of this court, that the subject is not open for discussion."

This view is also laid down in *Covington* v. *First National Bank*,[12] *Travellers' Ins. Co.* v. *Conn.*,[13] *Tappan* v. *Merchants' National Bank*.[14]

In view of these decisions it is scarcely safe to conclude that stocks of corporations organized in the United States held by non-resident aliens are not under any circumstances "property" in the United States.

It is equally unsafe to draw such a conclusion regarding foreign held bonds. The Attorney General's opinion regarding these cites no authorities and gives no reasons, but certainly the courts, whether logically or not, have not consistently held that bonds are never "property" at any place other than the owner's domicile.

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[9](1914) 232 U. S. 1, 34 Sup. Ct. 201.
[10]At p. 12.
[11](1905) 196 U. S. 466, 25 Sup. Ct. 297.
[12](1905) 198 U. S. 100, 25 Sup. Ct. 562.
[13](1902) 185 U. S. 364, 22 Sup. Ct. 673.
[14](1873) 86 U. S. 490.

For instance, in *Bristol* v. *Washington County*,[15] bonds of a resident of New York secured by a mortgage on property in Minnesota were held to be taxable in Minnesota where the bonds and mortgages were in the hands of agents in Minnesota.

Again in *New Orleans* v. *Stempel*,[16] certain credits and notes belonging to a resident of New York were held to be taxable in Louisiana under a personal property tax where the evidences of indebtedness were located in Louisiana. A similar holding is found in *Savings, etc. Society* v. *Multnomah County*.[17]

The grounds upon which the Attorney General bases his conclusions that it is not the intent of the law to tax incomes of non-resident aliens from stocks and bonds of American corporations, seem therefore open to criticism. If stocks and bonds under certain circumstances are for taxation purposes viewed as property elsewhere than at the owner's domicile and therefore sometimes as property in the United States, though the owner is a non-resident alien, and the law purports to tax incomes from all property in the United States, then such income would apparently, under those circumstances, come within the intent of the law.

But there are other reasons not given by the Attorney General which may perhaps support in part his conclusions.

It is not to be presumed that the law intends to levy taxes beyond the power of the United States nor beyond its normal jurisdictional scope. The Attorney General says that his opinion extends only to the intent and not to the power of congress. But if his other reasons are insufficient, the extent of the taxing power may be of great importance in determining what the intent is.

II.

Extent of Power to Impose Such a Tax.

In discussing the jurisdictional extent of the power of the United States to impose taxes we are not concerned with any constitutional limitations, because so far as territorial jurisdiction is concerned there are none.

There are, however, certain territorial limits on the power of any nation to impose taxes which have been recognized by

[15](1900) 177 U. S. 133, 20 Sup. Ct. 585.
[16](1899) 175 U. S. 309, 20 Sup. Ct. 110.
[17](1898) 169 U. S. 421, 18 Sup. Ct. 392.

the courts both in this country and in England and which are based on sound principles of comity.

Cooley, in his work on taxation says:[18]

"A state can no more subject to its power a single person or a single article of property whose residence or legal *situs* is in another state, than it can subject all the citizens or all the property of such other state to its power. The accidental circumstances that it may happen to have the means of reaching one and not the rest can make no difference; there must be an interest in the subject matter of the tax; there must be between the state and the tax-payer a reciprocity of duty and obligation, and these, in contemplation of law, would be wholly wanting in the case supposed."

In *State Tax on Foreign Held Bonds*,[19] Judge Field, delivering the opinion of the court, said:

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property and business."

In *Erie R. R.* v. *Pennsylvania*,[20] the court said:[21]

"No principle is better settled than that the power of a state, even in its power of taxation in respect to property, is limited to such as is within its jurisdiction. *State Tax on Foreign held Bonds*, 15 Wall. 300, 319; *Railroad Co.* v. *Jackson*, 7 Wall. 262; *St. Louis* v. *Ferry Co.*, 11 Wall. 423; *Delaware Railroad Tax*, 18 Wall. 206."

In a dissenting opinion delivered by Justice Field in the case of *U. S.* v. *Erie R. R.*,[22] it is said:[23]

"The power of the United States to tax is limited to persons, property, and business within their jurisdiction as much as that of a state is limited to the same subjects within its jurisdiction."

In the cases of *The Calcutta Jute Mills Co.* v. *Nicholson* and *The Cesena Sulphur Co.* v. *Nicholson*,[24] tried together, Kelly C. B., says:[25]

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[18]Vol. I (3rd ed.) at p. 249.
[19](1872) 82 U. S. 300.
[20](1894) 153 U. S. 628, 14 Sup. Ct. 952.
[21]At p. 646.
[22](1882) 106 U. S. 327, 1 Sup. Ct. 223.
[23]At p. 333.
[24]35 L. T. R. [N. S.] 275.
[25]At p. 283.

"Before I conclude my observations on this case, I might say that in the first place the great principle of the law of England in relation to taxation is, that the tax shall only be imposed upon persons or things actually within this country."

If there are certain territorial limitations to the jurisdiction of the United States to tax, it becomes important to determine exactly what is taxed by an income tax in order to determine whether the subject of taxation is within that jurisdiction.

The Attorney General says in his opinion above quoted,[26] that an income tax as defined by the Pollock case,[27] is a "direct property tax." The Pollock case does not, however, wholly identify a tax upon the income with a tax upon the property which is the source of the income. It merely held that the income and its source in the case of real and personal property at least are so closely identified that it must have been the intention of the framers of the Constitution to include a tax on income in the same category with the tax upon its source. It is true that in the original hearing,[28] the Chief Justice in referring to a number of cases says that "In none of them is it determined that taxes on rents or income derived from land are not taxes on land;" and also refers,[29] as authorities for the decision, to previous cases holding that "the tax on the occupation of an importer was the same as the tax on imports;" that "a tax on the income of United States securities was a tax on the securities themselves;" that "the income from an official position could not be taxed if the office itself was exempt;" that "the duty on a bill of lading was the same thing as the duty on the article which it represented;" and that "a tax on income received from interstate commerce was a tax upon the commerce itself." However, the opinion nowhere positively states that a tax on income is a tax on the source of the income, and in the re-hearing the Court, referring to the previous decision, says:[30]

"The Court went no farther, as to the tax on the income from real estate than to hold that it fell *within the same class as the source whence the income was derived,* that is, that a tax upon the

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[26]30 Op. Atty. Gen. 273.

[27]Pollock *v.* Farmers' Loan & Trust Co. (1895) 158 U. S. 601, 15 Sup. Ct. 912.

[28]Pollock *v.* Farmers' Loan & Trust Co. (1895) 157 U. S. 429, 579, 15 Sup. Ct. 673.

[29]At pp. 581, 582.

[30](1895) 158 U. S. 601, 618, 15 Sup. Ct. 912. The italics are the author's.

realty and a tax upon the receipts therefrom were alike direct, * * * and we are unable to conclude that the enforced subtraction from the yield of all the owner's real or personal property in the manner prescribed, is so different from a tax upon the property itself, that it is not a direct, but an indirect tax, within the meaning of the Constitution."

The opinion of the Supreme Court in the Brushaber case[31] carefully differentiated an income tax as being "direct" in a *"constitutional sense"* from taxes which are direct upon property. The court there in discussing the decision in the Pollock case said:[32]

"While not questioning at all that in common understanding it was *direct merely on income* and *only indirect* on property, it was held that considering the substance of things it was direct on property in a constitutional sense since to burden an income by a tax was from the point of substance to burden the property from which the income was derived and thus accomplish the very thing which the provision as to apportionment of direct taxes was adopted to prevent."

For jurisdictional purposes the Court is not, therefore, precluded by the Pollock case[33] and the Brushaber case from separating the income from its source. If the Act of 1913[34] is construed as taxing income only after it becomes the property of the person to whom it accrues, it may obviously have a different situs from its source, and the jurisdiction of the United States over "income" for taxing purposes may not be coincident with its jurisdiction over the property from which it arises. If the court adopts the view that the income is separable from its source, the court can nevertheless permit the Act to operate wherever it can find *income* as such within the jurisdiction of the United States. It would seem reasonable to tax *incomes* at any place where the income can be found as such, whether it has reached the person to whom it accrues or not. Upon such a basis the place where the income is *payable* may be a determining factor.

Foster, in his work on the Income Tax of 1913, seems to think that the right of taxation of income arising from debts due to

[31]Brushaber *v.* The Union Pacific R. R. (1916) 240 U. S. 1, 36 Sup. Ct. 236.

[32]At p. 16. The italics are the author's.

[33]Pollock *v.* Farmers' Loan & Trust Co. (1895) 157 U. S. 429, 15 Sup. Ct. 673.

[34]38 Stat. 166.

non-residents by residents of the United States is a closed question. He says:[35]

"Congress may tax all persons within the United States and all property within the United States, whether owned by residents or non-residents, *including debts due by residents of the United States to non-resident* aliens, and may collect from the debtor under a statute authorizing him to deduct the amount of the tax from the sum due his debtor."

In support of the latter part of this statement, Foster relies upon the opinion of Justice Bradley, with whom concurred Justice Harlan, in the case of *U. S.* v. *Erie Ry.*,[36] and quotes from that opinion, as follows:[37]

"I always regarded the tax which, by the one hundred and twenty-second section of the Internal Revenue Act of 1864, was laid upon the interest payable on the bonds and upon the dividends declared on the stock of railroad and other corporations, as a tax on the incomes *pro tanto* of the holders of such bonds and stock. *Stockdale* v. *Insurance Companies,* 20 Wall. 323, 333; *Railroad Company* v. *Rose,* 95 U. S. 78. * * *

"The objection that Congress had no power to tax non-resident aliens is met by the fact that the tax was not assessed against them personally, but against the *rem,* the credit, the debt due *to* them. Congress has the right to tax all property within the jurisdiction of the United States, with certain exceptions not necessary to be noted. In this case, the money due to non-resident bondholders was in the United States—in the hands of the company—before it could be transmitted to London, or other place where the bondholders resided. Whilst here it was liable to taxation. Congress, by the internal revenue law, by way of tax, stopped a part of the money before its transmission, namely, five per cent of it. Plausible grounds for levying such a tax might be assigned. It might be said that the creditor is protected by our laws in the enjoyment of the debt; that the whole machinery of our courts and the physical power of the government are placed at his disposal for its security and collection.

"Whether taxation thus imposed would be respected by foreign governments if the creditor could bring before their courts the debtor company or its property, does not concern us in considering the question now presented. There is nothing in the Constitution which authorizes this court, or any other court, to disaffirm the power of Congress to lay the tax. Congress is its own judge of the propriety or expediency of laying it.

"Indeed, so far as the power of Congress is concerned, regarded in reference to any power the courts have to limit or re-

[35]At pp. 28, 29. The italics are the author's.

[36](1882) 106 U. S. 327, 1 Sup. Ct. 223.

[37]At p. 703.

strain it, I see no reason why Congress may not lay a tax upon any property on which the government can lay its hands, whether within or without the jurisdiction of the United States. If, in imitation of the dues levied by Denmark upon vessels passing through the Cattegat Sound, Congress should levy a duty upon all vessels passing through the Strait of Florida, I do not know of any power which the courts possess to prevent it. It might create complications with foreign governments, it is true, and involve the country in war; but Congress has the power, if it chooses to take the responsibility, of creating, or giving occasion to such complications. The responsibility rests upon it alone.

"So if, in taxing money due from citizens of the United States to foreign citizens, any complications arise with the governments to which the latter are subject, Congress alone has the responsibility, and is the only department of our government, which has a right to take such a responsibility.

" * * * Considering, therefore, that if Congress chooses to take the responsibility of levying such a tax as the one in question, the courts have no power to control its action, or to give any relief to parties affected by it, I concur in the judgment of reversal."

This opinion is reported in the appendix to the official volume, and does not state the ground upon which the opinion of the court was delivered. The opinion of the court dismissed the case upon the authority of *Railroad Co.* v. *Collector*.[38] That case involved the tax also levied under Section 122 of the internal Revenue Act of 1864 as amended in 1866,[39] and was a suit by the Michigan Central Railroad Company against the Collector of Internal Revenue, to recover back a tax which had been paid to the Collector and retained from bonds paid by the Company in London to non-resident aliens. The railroad Company was not permitted to recover back the tax because the court interpreted the Act as imposing "an excise on the business of the class of corporations mentioned in the statute." The court said:[40]

"* * * the tax was not laid on the bondholders who received the interest, but on the earnings of the corporation which paid the interest."

There were sections in the Internal Revenue Laws passed in 1861, 1862, 1864 and 1866 which imposed taxes upon the incomes of individuals. Section 122 of the Act of 1864, as amended in

[38](1879) 100 U. S. 595.

[39]14 Stat. 138.

[40]100 U. S. at p. 598.

1866, however, was consistently interpreted by the court as imposing a tax not upon the bondholder, but an excise tax upon the corporation measured by sums which it paid out. *In Railroad Company* v. *Rose*,[41] the court said:[42]

"The tax specified in sect. 122 was levied upon railroad, canal, turnpike, canal navigation, and slack-water companies. The section did not include the tax upon the income of individuals. That was provided for always in other separate and distinct sections."[43]

Prior to these decisions the Supreme Court had apparently been somewhat undecided as to whether the section imposed an excise tax on the corporation or a tax on the bondholders.[44]

In view of the latter decisions, that the section imposed only an excise tax on the corporation and not on the bondholder, the opinion of Justice Bradley, relied upon by Foster, evidently misses the point, and the actual decisions under Sec. 122 of the Act of 1864 are, therefore, no authority for upholding the present tax upon the income from bonds held by foreign non-residents.

It is to be noted that Justice Field throughout all the decisions interpreting Section 122 of the Act of 1864, consistently held that the Act did impose a tax upon the income of the bondholder, and when the case of a foreign-held bond was presented in *U. S.* v *Erie Ry.*,[45] he dissented from the decision of the court in a vigorous opinion, upon the ground that the situs of the income was not within the jurisdiction of the United States. He said:[46]

"The bonds, upon the interest of which the tax in this case was laid, are held in Europe, principally in England; they were negotiated there; the principal and interest are payable there; they are held by aliens there, and the interest on them has always been paid there. The money which paid the interest was, until paid, the property of the company; *when it became the property of the bondholders it was outside of the jurisdiction of the United States.* * * * The foreign owner of these bonds was not in any respect subject to the jurisdiction of the United States,

[41](1877) 95 U. S. 78.

[42]At p. 79.

[43]The same principle was upheld in Memphis & Charleston R. R. *v.* United States (1883) 108 U. S. 228, 2 Sup. Ct. 482, and in Bailey *v.* Railroad (1882) 106 U. S. 109, 1 Sup. Ct. 62.

[44]Stockdale *v.* The Insurance Companies (1873) 87 U. S. 323; Railroad Company *v.* Jackson (1868) 74 U. S. 262; United States *v.* Railroad Company (1872) 84 U. S. 322; Haight *v.* Railroad Company (1867) 73 U. S. 15.

[45](1882) 106 U. S. 327, 1 Sup. Ct. 223.

[46]At pp. 332, 333.

neither was this portion of his income. His debtor was, and so was the money of his debtor; but the money of his debtor did not become a part of his income until it was paid to him, and in this case the payment was outside of the United States, in accordance with the obligations of the contract which he held. The power of the United States to tax is limited to persons, property, and business within their jurisdiction as much as that of a State is limited to the same subjects within its jurisdiction. *State Tax on Foreign-Held Bonds,* 15 Wall. 300."

If Section 122 of the Act of 1864 did in fact impose a tax upon the bondholder, as Justice Field, Justice Bradley and Justice Harlan interpreted it, the position of Justice Field seems to be much more in line with the weight of authority than the opinion of Justice Bradley.[47]

In *State Tax on Foreign-Held Bonds,*[48] the Supreme Court held that the State of Pennsylvania could not tax the interest payable on bonds of a railroad company incorporated in the State, held by non-residents. The court said:[49]

"But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. * * *

"The bonds issued by the railroad company in this case are undoubtedly property, but property in the hands of the holders, not property of the obligors. So far as they are held by non-residents of the State, they are property beyond the jurisdiction of the State."

In *Erie R. R.* v. *Pennsylvania,*[50] the court, interpreting a similar statute in Pennsylvania, held that the Act could not compel a foreign corporation to deduct a Pennsylvania tax from the interest payable in New York upon bonds owned by residents of the State of Pennsylvania, although the corporation had authority to do business in Pennsylvania and said:

"The money in the hands of the company in New York to be applied by it in the payment of interest, which by the terms of

[47]Railroad *v.* Jackson (1868) 74 U. S. 262; State Tax on Foreign Held Bonds (1872) 82 U. S. 300; Erie R. R. *v.* Pennsylvania (1894) 153 U. S. 628, 14 Sup. Ct. 952; Liverpool etc. Ins. Co. *v.* Board of Assessors (1899) 51 La. Ann. 1028, 25 So. 970, 45 L. R. A. 524.

[48]*Supra.*

[49]At p. 320.

[50]*Supra.*

the contract is payable in New York and not elsewhere, is property beyond the jurisdiction of Pennsylvania, and Pennsylvania is without power to say how the corporation holding such money, in another State, shall apply it, and to inflict a penalty upon it for not applying it as directed by its statutes."

Conclusions.

The fact that such sharp differences of opinion have existed among the learned justices of the Supreme Court and that the Treasury Department and the Attorney General now stand on record with diametrically opposing views is evidence that the questions presented are not free from difficulty.

The conclusions of the author, however, based upon this examination of the law, are as follows:

(1) Neither the Attorney General's opinion nor the Treasury Department's recent ruling is entirely correct. Under the present law, it is not proper to hold either that all income from stocks and bonds of corporations organized in the United States, owned by non-resident aliens, is taxable, nor to hold that all such income is not taxable.

(2) The law intends to tax all and only such income over which the United States has jurisdiction.

(3) The income tax is a tax on income and not a "direct" tax, except in a constitutional sense, and the ultimate test, therefore, where the United States has jurisdiction is not, even though the law purports to tax all income from "property in the United States", the location of the property out of which the income arises, but the location of the income as income.

(4) Where there are State statutes or decisions having the effect of creating a situs for stocks and bonds owned by non-resident aliens as property in the United States, and where the dividends and coupons are payable here, the income can be intercepted and taxed in this country, and is intended to be taxed by the income tax law.

(5) Where there is nothing to alter the logical rule that stocks and bonds owned by non-resident aliens have a situs only outside of the United States at the domicil of their owners, or where,

even though they have a situs here, the dividends or coupons are payable abroad, there is no income within the jurisdiction of the United States which can be reached, and such income is not taxable under the law.

(6) The present law should be amended to provide, if possible, a uniform rule, and to remove the present jurisdictional uncertainty in the matter.

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ARID-LAND WATER RIGHTS IN THE UNITED STATES.*

Anglo-Saxons are not known to have attempted irrigation on an extensive scale before 1847.[1] Since the beginning of history, that conquering race seems to have preferred to take for itself the humid parts of Europe and America, while its weaker Romance rival has been confined to the presumably less productive and partially arid reaches of the continents. With the occupation of Western America, came the social and economic problems of an arid environment, the necessary development of irrigation agriculture, and the spontaneous appearance of a theory of *riparian rights* which contradicts the principles governing the use of natural waters under the common law. By the exercise of this right in the use of water for irrigation, as justified by the new "doctrine of appropriation", over forty per cent. of the present area of the United States has become habitable and productive, and thereby is made to pay rich tribute to a national economy.

The efficacy of the common-law doctrine of riparian rights, under the conditions of English industrial and social development, is indisputable. This is clearly evidenced by the fact that the right of riparian proprietors not only has survived since time before the Cæsars, but has long been identified with the foremost Anglo-Saxon institutions of Justice, and its survival has, until recently, been in harmony with industrial economy and progress. It is also true that irrigation is one of the oldest arts of civilization and the doctrines of its practice are as venerable as they are old. The greatest nations of the ancient world maintained dominion for centuries in an almost rainless climate, and evidences of a prehistoric civilization in the dry places of the western hemisphere bear further testimony to the very ancient practice of irrigation economy.[2]

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*To be published in the forthcoming book of the author, Irrigation Water Rights.

[1]The Mormon colonists of Utah first diverted the waters of City Creek, near Salt Lake City, for the purpose of irrigation in the summer of 1847. (Bancroft, Hist. of Utah, p. 261; Whitney, Hist. of Utah, 1, 331; Wilford Woodruff, Utah Pioneers, p. 231).

[2]The code of Hamurabbi—said to have been formulated seven hundred years before Moses wrote—defines in detail individual rights in the use of water for irrigation, Ware, Roman Water Laws, pp. 13 & 14. Herodotus, writing 450 years before the Christian era, described the Assyrian irrigation system built by Nimrod, King of Babel, or Nebuchadnezzar about 2204 B. C., and which utilized canals and laterals some of which were navigable and connected the Euphrates with the Tigris. The historians Diodorous

The nativity of the legal doctrine of appropriation as a sanction of property in streams in the United States was concurrent with the exploitation of the gold fields of the Sierra Nevada Mountains, initiated in 1848. The lands upon which the precious metal was found had just been acquired from Mexico by the United States and were unsurveyed and not yet legally open to occupation and settlement.[3] Within a few months, following the discovery of gold in the sands of California, the canyons and mountain valleys of the district were populated by thousands of fortune seekers. They recognized no code of law, and possessed no

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and Pliny wrote of the reservoirs of the Nile Valley constructed by King Maeris about 2084 B. C., Gipps, paper before Royal Society of South Wales, December, 1887. The ancient flooding system of Egypt, the reservoirs of Persia, the Grecian aqueduct, the Roman conduits, and the Jewish canals near Hebron are of common knowledge.

In the western hemisphere irrigation is older than tradition. Evidences of it are to be found in many parts of the Southwest, especially Arizona and New Mexico. Some ancient canals are still plainly marked and in places modern irrigators are utilizing the works of those forgotten people; U. S. Geological Survey, Thirteenth Annual Report, pt. III, p. 136; Annual Report of the Smithsonian Institute, 1904, p. 588. At the time of the Spanish conquest of Mexico, appropriation of streams for irrigation prevailed among the Aztecs, the Toltecs, and the Vaquis, and the practice survives to this day among the Pinas, the Papagoes, and other native tribes of Pueblo Indians. The Pueblos use the water as they have done for generations and hold almost sacred their irrigation rights acquired by use and recognized by law, and in these rights no preference is given to a riparian owner. Irrigation in Peru is of ancient origin; but there early appropriation was directed by the state, which constructed and maintained canals for the use of the tillers of the soil. Necessity requires irrigation in parts of Spain, France, Portugal, and Italy. The Lombard Kings encouraged and advanced irrigation in Italy. The art was extended from Lombardy to France, and the Moors carried it into Spain, Sicily and Algeria. The Spanish conquerors brought a knowledge of irrigation to America and did much to advance its practice under the principle of state administration in the Spanish colonies. Escriche, "Aqua" pars. III & IV, also "Acequia". From Mexico, the Spanish system was carried northward into the "Californias" by the Jesuit and Franciscan Fathers. The first irrigation ditch in California appears to have been constructed about 1770, near San Diego Mission, and was followed by other works at the Mission of San Juan Capristrano in 1776, and at San Fernando two years later. James, In and Out of the Old Missions; Stoddard, In the Path of the Padres; Clinch, California and its Missions.

The Old Mexican Canal, which draws water from the Rio Grande River near El Paso and which is now to be served from the great Elephant Butte dam constructed by the United States Reclamation Service, has been in continuous use for probably 300 years. By the treaty with Mexico, signed May 21, 1905, the United States recognized the priority irrigation right of Mexico in the waters of the Rio Grande to the extent of the capacity of this ancient canal. The treaty provides for the free and perpetual delivery by the United States of 60,000 acre feet of irrigation water annually, at the point of diversion of the Mexican Canal. 34 Stat. pt. III, 2953.

[3]Treaty with Mexico, "Guadalupe Hidalgo". Feb. 2, 1848. 9 Stat. Treaties 108.

trained or organized legislative, judicial or executive agencies,[4] but the necessity for order and system and the judicial temperament of the dominating Anglo-Saxon element soon put on foot a semblance of law and administration. However, as regards property rights and mining privileges, the customs growing out of the antecedent Mexican rule under the *civil law* were generally recognized.[5]

Miners held meetings in various "bars", "diggings", and "camps" and enacted regulations by which, in lieu of other law, they agreed to be governed. These codes provided for a measure of security of persons and property, and their provisions were singularly uniform in principle and their administration effective.[6] The laws of the United States, as they were applicable to this country, gave title in real property to no one, except through the grant of certain lands to the State of California,[7] and through pre-

[4]Prior to March 3, 1849, no attempt was made to extend the operation of federal laws to California, and, on that date, only the revenue laws were so extended by Congress. 9 Stat. 400.

[5]"The Spanish-American system which had grown up under the practical working of the mining ordinances of New Spain, was the foundation of the rules and customs adopted . . . But they were not the spontaneous creation of the practical miner of 1849-50. They reflect the natural wisdom of the practical miner of past ages, and have their foundation . . . in certain natural laws, easily applied to different situations, and were propagated in the California mines by those who had a practical and traditional knowledge of them in their varied forms in the countries of their origin, and were adopted, and no doubt gradually improved and judicially modified by the Americans". Yale, Mining Claims and Water Rights, pp. 58 & 59.

Until the admission of California into the Union in 1850, the country was governed by military authority. Upon the accession in 1848, the customary Mexican laws continued to be recognized locally. On Feb. 12, 1848, Colonel Mason issued a proclamation as military governor, by which he attempted to put an end to the local uncertainty as to the status of the law, by decreeing that "From and after this date, Mexican laws and customs now prevailing in California, relating to the denouncement of mines, are hereby abolished". *Id.* p. 17.

[6]A collection of the rules and customs enforced in the various districts appears in a report by J. Ross Browne, Commissioner of Mining Statistics in Mineral Resources, 1867, pp. 235-247.

Mr. Browne describes the main purposes of the codes as the fixing of district boundaries, the size of claims, and the manner of marking and recording claims, also the determination of the amount of work that should be done to hold a claim, and the circumstances under which claims should be considered abandoned and open to occupation to new claimants. *Id.* p. 226.

On customs and regulations of miners of early California, see also Yale, Chaos, VII & VIII; Lindley, Mines, sec. 40 *et seq.*: Bancroft, Popular Tribunals, Gen'l Works, Vols. 36 & 37.

[7]Until 1862, the preemption right was not extended to the unsurveyed lands of the United States and was thus excluded from the Mexican cession. Since that time the right was applied to unsurveyed lands; but

existing Mexican grants which were formally acknowledged upon the acquisition of California by the federal government.[8] Local legislation could not establish property rights in natural agents, as against the United States; but, as among private persons and in the absence of the exercise of federal authority, such legislation was justifiable and, indeed, necessary if industrial development was to persist.

The objects of the codes of the early Californians, aside from that of personal safety, were to secure, within practicable limits, equality of right and opportunity in acquiring and operating mines, and to define justifiable property in natural resources. To best accomplish this, *he was made first in right of property who was first in time of possession, and his utilization of that right gave him a valid claim against all others except the nation. Discovery, followed by appropriation, was recognized as a sanction of title, and a specific measure of use or development of the property thus acquired was requisite to its retention.*[9]

By virtue of the necessity of its use in both mining and agriculture, flowing water assumed a relation to the industry of the West, comparable in importance to that of the placer sand, the quartz vein, or the soil itself. Each was a physical part of the public domain, each was useful and unused, each was limited in amount and valuable, and if a rule of *appropriation and use* was justifiable as an essential of the realization of property rights in one, it likewise appeared to be a worthy essential of property in the others. So the rule of justice and expedience declared that

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until lands are surveyed and plats filed settlers can make no record of their preemptions and have little better than a squatter's right.

California received large federal grants of indefinitely defined "Swamp" and school lands which, however, in defiance of law, were openly sold at private sale until such disposition was declared illegal in 1863. (On the early land policy of California see Henry George, Our Land and Land Policy, San Francisco, 1871; republished in complete works, Vol. VIII, 1904).

[8] "Treaty of Peace, Friendship, Limits, and Settlement" (Guadalupe Hidalgo), 1848, Art. VIII; 9 Stat. Treaties 115.

[9] "The miners of California have generally adopted, as being best suited to their peculiar wants, the main principles of the mining laws of Spain and Mexico, by which the right of property in mines is made to depend upon *discovery* and *development*; that is, *discovery* is made the source of title, and *development,* or *working,* the condition of the continuance of that title. These two principles constitute the basis of all our local laws and regulations restricting mining rights". Halleck, in Introduction to his translation of De Fooz on the Law of Mines, Sec. XII.

On the origin of the right to appropriate water, see Pomeroy, Water Rights, 13, 18; Justice Field, in Jennison *v.* Kirk (1878) 98 U. S. 453; W. M. Stewart, Cong. Globe, 1st Sec., 39 Cong., Pt. IV, p. 3225.

he who first turned the waters of a stream from its course, or of a lake from its bed, and applied them to beneficial and continuing use was first in a property right in that stream commensurate to and concurrent with that use. This doctrine was inaugurated by the placer miners of California and for a time defended as their exclusive prerogative; but the application of a stream of water to an area of placer sand for the direct extraction of gold differs, neither in economic principle nor legal sanction, from the application of the waters of a stream to an area of land for the creation of values through the medium of agriculture.[10]

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[10]Not only early codes, but formal legislation favored miners against others. For a long time, appropriation for mining purposes was understood to take precedence of the use of water for agriculture. The "Possessory Act", of 1852, sought to establish this precedence, and, in granting possessors of public lands access to the courts in action against those interfering with their possessions, agriculturists and graziers were denied protection against the dog-in-the-manger tactics of miners. The "Indemnity Act" of 1855 required miners entering upon agricultural lands to give bond for possible damages to agricultural improvements. The Indemnity Act was held unconstitutional in Gillan *v.* Hutchinson (1860) 16 Cal. *153, but was again upheld in Rupley *v.* Welch (1863) 23 Cal. *452.

An act of May 15, 1854 (Cal. Laws of 1854, p. 76) recognized the needs of agricultural sections of the State for irrigation facilities. The mining interests were so influential, however, as to so modify the bill that the law was of little benefit to the farmers. Some provisions of the law are of interest as declarative of principles of the common law and favoritism toward the mining industry. Boards of commissioners and overseers were provided to regulate water courses in certain counties and distribute water. The ditches were to be constructed by work performed as on public roads. Water rising on land owned by any person was not subject to the provisions of the act unless it passed beyond the limits of the land, no person could divert the water of a natural stream to the detriment of a riparian dweller below, and no ditch could be run across the estate of another without compensation to be agreed upon. Section 15, of the Act, contained the important proviso—"Provided that nothing in this Act shall be construed to apply to the mining interests of this State". This section was amended in 1860 (Cal. Laws of 1860, p. 335) and again in 1862, (Cal. Laws of 1862, p. 235), but no change was made in the proviso. The counties of San Diego, San Bernardino, Santa Barbara, Napa, Los Angeles, Solano, Contra Costa, Soluso, and Tulare were included in the provisions of the original bill. Other acts of the same special nature have applied to other counties.

"These acts, with the significant proviso, clearly show that the legislature was determined to let the condition of things existing in the mines, with relation to water rights, remain as they were projected by individual enterprise without the sanction of any recognized rule of law". Yale, *op. cit.* 140.

The statutes defined above are still nominally in force in California, but a long series of decisions have so limited and qualified their terms as to make them of no effect as respects the appropriation of water (see Wiel, Water Rights in Western States, (3rd ed.) 1112, and cases there cited). The present law is substantially stated in Natoma Water and Mining Co. *v.* Hancock (1894) 101 Cal. 42, 31 Pac. 112, 35 Pac. 334. In discussing the earlier case of Rupley *v.* Welch, *supra*, the court said at p. 55:

Upon these premises, was established the doctrine of priority of appropriation, by which is defined the title in real property in the arid districts of America. While the miners were developing the doctrine of appropriation of water for mining purposes in California, the same principle was being made the basis of property in water for irrigation in Utah. However, in Utah, the community interests of Mormonism gave rise to practices in the appropriation of water somewhat at variance with those of the California settlements.

Historically, the law of appropriation of water to beneficial use and the consequent American irrigation water right may be said to be outgrowths of the California mining law, and thus indirectly derived from the civil law of Mexico and Spain, and, *ipso facto,* from the Roman Law.[11] The historical connection, however, although real, is incidental and constitutes no adequate causal explanation of the prevailing doctrine of appropriation in the West. On the other hand, economic and social relations resulting from the physical environment of an arid climate and evolved under the political régime of the American frontier must inevitably have given birth to such a theory of property in water regardless of history.

Until 1851, the status of the law in the West remained as formulated by the miners in their codes of local authority.[12] In that year, the first legislature of California gave those voluntary regu-

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"The point . . . contended for by the defendants was that a prior appropriation of water for irrigation was of no avail against a subsequent appropriation for mining. The court merely decided that the appropriation for irrigation was good against miners as against others . . . This is a doctrine which, at the present day, no one disputes, but in early mining times the paramount right of the miner was strenuously insisted upon by the miners and in mining sections often exercised with a high hand, as it was by the defendants in Rupley *v.* Welch". The final result is that all industrial pursuits are treated impartially in California as concerns water. See Yale, p. 139.

[11]Titcomb *v.* Kirk (1876) 51 Cal. 288; Wiel, *op. cit.* §§ 68, 686. The great books of the Spanish Law, called the "Partidas" are in fact a condensation of the Roman Law as contained in the Pandects of Justinian. Ware, Roman Water Laws, p. 17.

[12]These regulations related, in part, to the manner of acquisition and holding "claims" to mineral lands, and to the use of water for mining. They provided for the appropriation of parcels of land and the flow of streams, and the amount of development or use which would give the appropriator a prior right over all others to their enjoyment. They further provided for recognition of conditions constituting an abandonment or forfeiture. Black's Pomeroy on Water Rights, pp. 18-24.

lations legal and compulsory efficacy by statute.[13] For eighteen years after settlement began in California, the local impromptu codes, as sanctioned by statute and moulded and applied by the courts, constituted the law governing property rights in mineral lands and flowing waters *on the public domain.* The sale of mineral lands was not authorized by the United States until July 26, 1866.[14] In the first section of the act of that date, it was declared that *mineral lands of the United States were free and open to exploration and occupation, subject to such regulations as might be prescribed by law and the local customs or rules of the inhabitants of the several districts, as far as the same were not in conflict with the laws of the United States.* The act further provided that *water rights established by priority of possession should be maintained and protected, and the right of way for canals and ditches for the purpose of diverting water for mining, agricultural, or mechanical use was acknowledged and confirmed.*[15] The United States Supreme Court has designated this act as "a voluntary recognition of a pre-existing right of possession constituting a valid claim to continued use".[16] By this law, *possessors* were enabled to establish permanent rights by government patent, and by acts of July 9, 1870, and May 10, 1872, all subsequent patents were issued subject to previously vested water rights.[17]

The federal statutes mentioned above paved the way for a formal abrogation of the common-law doctrine of riparian rights by the States throughout the arid region, and for the legal confirmation of the new doctrine of appropriation.

For over half a century, the doctrine of appropriation, as worked out by the gold miners, has served as the ruling principle in the construction of water law in the West. However, the application of the doctrine has not been extended without confusion and difficulty, nor has the principle itself remained without amendment. The old legal doctrines were firmly intrenched behind custom and vested interests. The proponents of the common law, especially in the semi-arid States where climate is not an impera-

[13]"In actions concerning mining claims, proof shall be admitted of the customs, usages, and regulations established at the bar or diggings embracing said claims, and such customs, usages and regulations, when not in conflict with the Constitution or the Laws of this State shall govern the decision of the action". Cal. Laws of 1851 c. 5 § 251.

[14]14 Stat. 251.

[15]14 Stat. 253; U. S. Rev. Stat. 2339; U. S. Comp. Stat. 1901 § 1437.

[16]Broder *v.* Water Co. (1879) 101 U. S. 274.

[17]16 Stat. 217, 218; 17 Stat. 91; U. S. Rev. Stat. 2340.

tive obstacle to its application in matters of water rights, have been active in opposing legislation and judicial precedent of contrary principle. Compromise has been attempted, and California herself has led in a determined and, we believe, unsuccessful attempt to harmonize the two theories of water rights.[18] Several of the semi-arid States have followed California in attempting to occupy a middle ground upon principles of water rights, but no arid State has succeeded in so doing. Nevada emulated the dual system of California, until, in 1889, a hopeless entanglement of water claims caused the supreme court of the State to reverse its former rulings and adopt a positive principle applicable to the economic use of water in that State.[19] Oregon, until 1909, a common law State, enacted a comprehensive statute in that year which virtually abandons the riparian doctrine as a basis of future irrigation water rights.[20]

As the several States and territories of the arid West have successively recognized and applied the doctrine of appropriation, the nature of its elaboration and the manner of its administration have varied within wide limits, but the fundamental principle remains unchanged. An important step in the evolution of the rule of priorities has been its recognition of different uses to which water may be applied. First designed to apply to the gold placers of the Sierras, the doctrine was soon extended to recognize agricultural and mechanical uses on a par with mining uses. In some States, notably Colorado and Wyoming, industrial progress created a changed order of importance among uses and the agricultural use has come to be recognized as the more essential and primary. Because of the varying intensity of needs served in the different uses, the law gradually was made to acknowledge the relative importance of the uses as well as to recognize the order of appropriation.[21]

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[18]For a brief treatment of the California system, see, Appropriation of Water in California, by A. E. Chandler, California Law Rev. March 1916.

[19]Reno Smelting etc. Works *v.* Stevenson (1889) 20 Nev. 269, 21 Pac. 317; Anderson Land & Stock Co. *v.* McConnell (C. C., D. Nev. 1910) 188 Fed. 818.

[20]Oregon, General Laws Vol. III, p. 2337.

[21]"Preferred uses shall include rights for domestic and transportation purposes; existing rights not preferred, may be condemned to supply water for such preferred uses in accordance with the provisions of the law relating to condemnation of property for public and semi-public purposes. Such domestic and transportation purposes shall include the following: First—Water for drinking purposes, both for man and beast; Second—Water for municipal purposes; Third—Water for the use of steam engines and for general railway use; Fourth—Water for culinary, laundry, bathing, refrig-

A second significant tendency in irrigation practice and law is to merge individual rights into classified priorities, and to administer the pooled rights constituting each class for the equal benefit of all proprietors within the group. This tendency has perhaps reached its widest development in Utah, but the rapid expansion of the "district system" in the several States is bringing it into general recognition.[22]

Colorado was the first State to incorporate the doctrine of appropriation in its constitutional law. The provisions of the constitution of that State, relating to title in the use of water, promulgate the doctrine in its generally accepted terms, and the laws of other States and territories which recognize the principle of the doctrine are essentially derived from the Colorado law. The provisions of the Colorado constitution relating to the subject are as follows:

"The water of every natural stream, not heretofore appropri-"ated, within the State of Colorado is hereby declared to be the "property of the public, and the same is dedicated to the use of "the people of the State, subject to appropriation as hereinafter "provided" (Art. XVI., Sec. 5).

"The right to divert unappropriated waters of any natural "stream for beneficial use shall never be denied. Priority of appro-"priation shall give the better right as between those using the "water for the same purpose; but when the waters of any natural "stream are not sufficient for the services of all those desiring the "use of the same, those using the water for domestic services shall "have the preference over those claiming for any other purpose; "and those using the water for agricultural purposes, over those "using the same for manufacturing purposes" (Art. XVI., Sec. 6).

This law denies the riparian proprietor, as such, all property rights in an adjacent stream, that is to say, *he has no usufruct in the stream not open to others whose estates are non-riparian.* The State asserts a sovereign ownership over the industrial resources of all natural streams,[23] and it grants a right of user, up to the

erating (including the manufacture of ice) and for steam and hot water heating plants. The use of water for irrigation shall be superior and preferred to any use where turbine or impulse water wheels are installed for power purposes". Wyo. Comp. Stat. 1910 § 725.

"The most essential element of an appropriation of water is its beneficial use". Eastern Ore. Land Co. *v.* Willow River etc. Co. (C. C., D. Ore. 1910) 187 Fed. 466; Town of Sterling *v.* Pawnee Ditch Extension Co. (1908) 42 Colo. 421, 94 Pac. 339 and cases there cited.

[22]Hess, R. H., in Baily's Encyclopædia of Amer. Agriculture Vol. IV, p. 166.

[23]"Natural streams was used in the broadest sense and intended to include all tributaries and the streams draining into other streams, including all sources which go to make up the natural stream. Percolating waters finding their way to a stream are tributary thereto". *In re* German Ditch & Reservoir Co. (1913) 56 Colo. 252, 139 Pac. 2.

capacity of the stream, to those persons who properly apply the waters to domestic, agricultural, or other purposes. The location of the lands of the user, with respect to the course of the stream, is of no legal consequence. They may border the stream or may be remote therefrom. In fact, no reason appears why the streams of one watershed may not be diverted for the benefit of the lands of another watershed, and such action has been sustained by the courts of both Colorado and Wyoming, and, in so far as any extra-riparian appropriation may be recognized, in California.[24] The law implies that the *quantitative measure of a water-right* is the extent of the initial use, which, of course, is contemporary with the actual diversion and benefit; but the *priority of the right* has been variously fixed as of the time of declared intention to divert water to the time of the actual application of water to the soil.[25] Ordinarily, no limit is placed upon the extent of the initial diversion if it is for actual use; but in several States, notably Wyoming and Nebraska, the legitimate use of a given flow of water is defined and an excessive diversion for any area of land is forbidden.[26]

When the waters of a stream are insufficient for the needs of all, the order of satisfaction of the needs shall be that of the initial appropriation (in time) of the water to the needs, provided that the nature of certain needs shall designate them as privileged over other needs, in disregard of the order of appropriation. This recognition of preferred needs and classified uses negatives, to a degree, the primary conception of the doctrine of appropriation—"First in time, first in right". By this provision, there is created an elasticity in the law which favors its adaptability to economic progress. Social and industrial evolution in the irrigation country is extremely rapid, and if legal principles and institutions are to be of surviving efficacy they must be cognizant of evolutionary facts and they must be incorporated in forms sufficiently flexible to admit of adjustment to the changing relations of industrial and social factors.

Prevailing methods of determining the titular facts of time, extent, place, and manner of initial diversions and uses of water for irrigation are, at best, approximate, and out of their inaccura-

[24]Coffin *v.* Left Hand Ditch Co. (1882) 6 Colo. 443; Miller *v.* Bay Cities Water Co. (1910) 157 Cal. 256, 107 Pac. 115.

[25]This reference of the priority to a specific act of appropriation is known as the *doctrine of relation.*

[26]In these States the legal "duty of water" is defined by statute as 70 acres per 1 cubic foot flow of water per second.

cies grow many of the administrative problems of irrigation.[27] This is true because, by the attributes and contingencies of the *initial use,* the nature, amount, and priority of the water right is defined. The irrigation States and Territories have undertaken different methods of ascertaining these important facts and of applying the principles of the law in accordance with them. In this respect, laws of different States vary widely, and have been subject to judicial interpretations so paradoxical as at times to subvert the principles of the elementary doctrine. In this variation, there has been a gradual approach towards uniformity of results which, it must be admitted, has been due to reason rather than logic. At times, however, there have been marked recessions, on the part of individual States, in their construction of water rights.

ANTIQUITY OF THE DOCTRINE OF APPROPRIATION.

The legal theory of the relation of property rights to priority of appropriation of natural resources is of much longer standing than is its recognition in the water laws of the United States. Indeed, the priority right may be considered as a refined derivative of the natural law of the appropriation of free goods—*possession grants ownership.* This theory is recognized by international law in defining the rights of discovery, exploration, and occupation, and it has long been the basis of governmental policy in distributing the public lands of the United States in the promotion of social welfare and industrial development. Where water exists as an unappropriated good, but in quantities not sufficient for all actual or potential uses, the application of the principle of priority rights is in harmony with established custom and law generally pertaining to the acquisition of title in unappropriated goods of like economic significance.

Irrigation is probably as old as cultivation, and the law of waters is of like antiquity. The plains of Egypt and Assyria evidence ancient irrigation works which present skill and capital would hesitate to undertake, and southern Europe and western America, doubtless, long ago maintained definite principles of irrigation law.[28] Records do not enable us to determine in all cases the systems of legal rights by which the use of water was con-

[27]New Brantner etc. Co. *v.* Kramer (1914) 57 Colo. 218, 141 Pac. 498; United States *v.* Bennett (C. C. A. 9th, 1913) 207 Fed. 524; Thayer *v.* California Development Co. (1912) 164 Cal. 117, 128 Pac. 21.

[28]See note 2.

trolled among ancient peoples. It is known, however, that in some countries, notably Egypt and India, the state constructed the distributing system, and the distribution was a matter of provincial regulation.[29] In Mexico and Peru, the state delivered the water to the local authorities of the Pueblos who were entrusted with its final distribution.[30] *It is likely that, among the ancients, the general rule was to consider water and its use for irrigation as subject to government ownership and control.*

Private property in water for purposes of irrigation is known to have persisted since the beginning of written history. Of especial interest is the fact that abundant recognition of the use of water for irrigation, and clearly defined *individual rights* in the same are to be found in the Roman law. In the Justinian *Corpus Juris Civilis* we find the following:

"There is nothing to prevent anyone taking water from a public "river, unless the sovereign or the senate forbids it, provided that "the water so taken is not in public use. But if the river is either "navigable or makes something else navigable, the water is not "permitted to be used.[31] Many may take away water from a river, "but in such manner only that their neighbors are not injured, or, "if the stream is not large, those on the other side."[32]

A study of the origins of Anglo-Saxon law reveals the development of a system of water law having its beginnings in the civil law of Rome and, in its maturity, known as the *English common law doctrine of riparian rights.* It is possible to trace a parallel growth of water law which also takes its source from the Roman law, but recognizes a different type of natural conditions, and, con-

[29]Gast, in Legal Advisor, Vol. II, p. 108; Mead, Egyptian Irrigation; Bulletin of U. S. Office of Experiment Station No. 130, 61.

[30]"The laws of Mexico relating to Pueblos conferred on the town authorities the power of distributing, to the common lands and to its inhabitants, the waters of an unnavigable river on which the Pueblo was situated. It would seem that a species of rights to the use of all its waters necessary to supply the domestic wants of the *pobladores*, the irrigable lands and the mills and manufactories within the general limits, were vested in the Pueblo authorities, subject to the trust of distributing them for the benefit of the settlers". See historical sketch of water rights in California before the American occupation, in Lux *v.* Haggin (1886) 69 Cal. 255, 4 Pac. 919, 10 Pac. 674.

The rights conferred under the Mexican grants and the custom of their use prior to the dominion of the United States are confirmed by present law and administered in trust under control of the legislature. Vernon Irr. Co. *v.* Los Angeles (1895) 106 Cal. 237, 39 Pac. 762; Los Angeles *v.* Los Angeles F. & M. Co. (1908) 152 Cal. 645, 93 Pac. 869, 1135.

[31]Pomponius, in Justinian, Dig., Bk. 43 Tit. 12 Par. 2.

[32]*Id.* Dig., Bk. 43 Tit. 20 Par. 3.

sequently, disregards the common law concept of private property in riparian waters, being, in its logical development, identical with the *American doctrine of appropriation.*

The Roman law not only established the principles of private property in water for the purposes of irrigation, but elaborate provisions were made for economic distribution and use. Streams were classified as *perennial* and *torrential,* each being carefully defined and, accordingly, water rights thereon were made different in nature.[33] Rights to the use of water distinguished also between summer (*aestival*) and daily (*quotidian*) water, and even authorized the modern practice of rotating or "swapping" water,[34] and, what is in advance of present law and economy, water rights were designated as limiting use to specified days or hours.[35] Prætorian interdicts established a right to acquire property in water by prescription, or undisputed use for a specified time, it being required only that the diversion and use should have been accomplished without force, stealth, or variation, and for one year previous at least.[36] Different interdicts were made to apply to daily and summer waters, respectively, the one designating the prerequisite use of the year before, and the other as of the summer before.[37] The nature of the uses of water and the quality and location of the lands to which it might be applied were carefully described in the Roman law and in judicial opinions thereon. Some of these

[33]Rivers were distinguished from brooks by size, and rivers were classified as *perennial* or *torrential,* according as they flowed continually or only in flood time. Ulpian, in Justinian, Dig., Bk. 43 Tit. 12 Par. 1.

[34]*Id.* Dig., Bk. 43 Tit. 20 Par. 5.

[35]*Id.* Dig., Bk. 43 Tit. 20 Pars. 1, 22. Such an intermittent right was approached in the decision in Gardner *v.* Wright (1907) 49 Ore. 609, 91 Pac. 286. The Court held that one may establish a right in the use of a stream for a part of the year, while another may at the same time, acquire a property in the water for the remainder of the year.

A Colorado decision in 1911 by Judge H. P. Gamble, in the District Court designated an "irrigation season" for the direct use of water in the summer; and, in the winter, a "storage season" for waters of the Platte River. This very rational and progressive ruling of Judge Gamble has recently been reversed by the Supreme Court of Colorado. Comstock *v.* Larimer & Weld (1914) 58 Colo. 186, 145 Pac. 700.

[36]"Scavola said that judges are accustomed to protect canals of long-established use although the right was not susceptible of proof". Justinian, Dig. Bk. 39 Tit. 3 Par. 26.

[37]"I forbid violence against him who, adversely to you, is using water as it has been used during the past year without force, stealth, or variation. This applies to daily water". Interdict of the Praetor, *id.* Bk. 43 Tit. 20, Par. 1.

"I forbid violence against him who, adversely to you, has been using water as he has used it during the past summer without force, stealth, or variation. This interdict applies to summer water". *Id.* Bk. 43 Tit. 20 Pars. 1, 29.

provisions and opinions are strongly suggestive of a mature consideration of present-day problems which are as yet unsolved. Important among such matters are methods of measuring uses and rights, and means of determining what lands are justified in receiving the benefits of uses to be granted.[38] It is also evident that the Roman law was abreast of our own in acknowledging the measure of damages in payment due those whose property was injured from the owners of ditches responsible for the injury.[39] The highest refinement attempted by present irrigation laws was approached by the Roman judges, in the year 294 A. D., when it was declared that "It is not acreage, but the use to which the water is put, that measures the right to the water".[40] This phrase incorporates an advanced and only recently attained position in the science of irrigation law. Under the principle contained therein, the attempt is to make domestic use, municipal use, use for stock and gardens, use for field agriculture, use for mining, and use for mechanical purposes to assume precedence in the order named. It is not area, but the nature of the use which should measure the right; and if water is scarce, the distribution of such as there is should follow the order of the uses, the priority of appropriation being a valid contention for preference only within groups claiming for a like use.

Present problems of law and practice arise in the attempt to fix upon some adequate standard by which to measure rights in the use of water for irrigation. Several standards have been tried, and each has given cause for dissatisfaction. They have been as follows:[41] (1) *Actual flowage of water originally claimed,*

[38]"It should be understood that the Praetor has ordered that water be conveyed in the same manner that it has been used during the past year. Hence, it may be seen that the water is not to be different water or for a wider use. Therefore, if it is some other water which he wishes to convey, or if it is the same water, but he wishes to convey it to some other region, force may be used against him with impunity". *Id.* Bk. 43, Tit. 20, Pars. 1, 15.

"Labeo says that all parts of an estate into which water is conveyed are counted as one whole. If, therefore, perchance, a plaintiff buys an adjoining field and from the field into which he has conveyed the water for the first year he wishes afterward to lead the water into the said purchased field, he can do so under this edict . . . because, being once in his own inclosure, he can go where he pleases unless damage comes from him to whom the water is conveyed away". *Id.* Bk. 43, Tit. 20, Pars. 1, 16.

[39]Ware, Roman Water Laws p. 93.

[40]*Id.* p. 94.

[41]For recent judicial tests of beneficial use and amount of water necessary, see Weldon Valley Co. *v.* Farmers' Pawnee Co. (1911) 51 Colo. 54, 119 Pac. 1056.

disregarding the manner of the use; (2) *the capacity of the original canal of diversion, disregarding the manner of the use;* (3) *the amount of water habitually used since the time of diversion;* (4) *the actual area to which the use is applied, having due regard for the duty of water.* A modification of the fourth criterion has been advanced and partially maintained by Wyoming, Nebraska, and other States by making the right of use of a particular appropriation an appurtenance to prescribed lands.[42] The same provision is now being very generally advanced by the administrative restriction of use by irrigation districts and by water users' associations operating under the regulations of the United States Reclamation Service. This most recently introduced and still immature principle of the American water right is clearly suggested in the text of a decree of the emperors Antoninus and Verus when they directed that "water from public streams ought to be divided for the irrigation of fields in proportion to the holdings;[43] and, in a further quotation from the *Pandects*—"From my right, so Labeo says, I may accommodate any of my neighbors with water. On the other hand, Proculus holds that the water may not be used for any other part of the estate than that for which the right was acquired. The opinion of Proculus is the truer one".[44]

The right of way for irrigating canals over the lands of others than the builders was recognized by the Roman law,[45] and the fact of beneficial use, as essential to title, was made the theme of a decree under date of 397 A. D.[46]

A survey of the Roman law not only reveals the probable origin of the English Common-law riparian rights, but also proves ancient legal recognition of a non-riparian water use. It reveals

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[42]Rights established by order of the Board of Control have been defined as attaching to the land to be irrigated, and the land and the ditch of diversion have been carefully described, it being the theory that the right of use is restricted to the place and purpose for which it was acquired. However, the Supreme Court of Wyoming has decided that water rights are not inseparably attached to particular tracts of land, and that they may be sold. Johnston *v.* Little Horse Creek Irr. Co. (1904) 13 Wyo. 208, 79 Pac. 22.

[43]Justinian, Digest, Bk. 8, Tit. 3, Par. 17.

[44]Pomponius, *Id.* Dig., Bk. 8, Tit. 3, Par. 25.

[45]Ware, p. 101.

[46]"We ordain that ancient water rights, established by long ownership, shall continue to the individual citizen, undisturbed by innovation; provided, however, that the quantity which each takes by ancient rights is that which by custom he has been taking continuously until the present day". The Emperors Arcadius and Honorius to Asterius Count of the East, Justinian Code, Bk. 11, Tit. 42, Par. 4.

the existence of water rights and methods of systematic distribution of water for purposes of irrigation quite consistent with and, in many respects, identical with the modern theory of *property in water by virtue of appropriation and beneficial use.* In fact, the Roman law was abreast of some of the most advanced interpretations and elaborations of that modern doctrine. The actual *priority right* does not appear in the available fragments of the Roman law; but it is to be remembered that Roman waters were appropriated to use long before the Imperial Law, as we know it, was formulated. The experience in Rome of settling wild lands and appropriating unclaimed natural resources, which alone could give rise to the elementary conception of the doctrine of priorities, was not contemporary with the formation of the Justinian Code or the laws of the Digest. However, "prescriptive use" for purposes of irrigation and the right thus acquired, which was well known to the Roman law, is of the nature of the "priority right". The remaining factors of the modern theory—(1) the legality of non-riparian privileges, (2) the requirement of beneficial use, (3) the recognition of classified and graded uses, (4) the essential quantitative measure of rights, and (5) the location or incidence of the use—are alike common to the law of Rome and to the law of arid America.

R. H. Hess.

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JUNE, NINETEEN HUNDRED AND SIXTEEN.

Columbia Law School has the misfortune this year to lose the services of Professor Burdick, Professor Kirchwey, and Professor Redfield. Every one knows how much they enhanced the reputation of the School by their teachings and their writings. The loss falls with particular weight on the LAW REVIEW. Professor Burdick and Professor Kirchwey acted as Trustees of the REVIEW for many years, and they and Professor Redfield were always ready to help it in every possible way. We take this occasion to thank them for their generous assistance in the past, and to express the hope that, despite their retirement from active teaching, they will still let us come to them for advice in the future.

NOTES.

THE STATUS OF ARMED MERCHANT SHIPS.—In any discussion of the question of armed merchant ships, the three classes, privateers, auxiliary cruisers, and defensively armed trading vessels, must be carefully distinguished. Privateers or private armed vessels were authorized to cruise for the profit of the owners and to take prizes;[1] they were commissioned for offensive operations, and they could exercise the belligerent right of visit and search.[2] As a consequence of the depredations of these vessels, due to the lack of sufficient governmental

[1]2 Halleck, International Law (4th ed.) 128; Hall, International Law (6th ed.) 518.

[2]Oppenheim, International Law (2nd ed.) 534 n. 3.

control, merchant vessels began to travel armed and to resist visit and search.[3] The latter differed from privateers in that they were not commissioned and were not entitled to operate offensively.[4] With the abolition of privateering by the Declaration of Paris[5] in 1856, merchant vessels armed for defense seem to have disappeared for some time. During the Franco-Prussian War, the King of Prussia issued a manifesto purporting to provide for the establishment of a volunteer navy. The crews of privately owned merchant vessels hired as auxiliary cruisers by the government were to be placed under naval discipline and supplied with the regular naval uniform. These were *public* armed vessels, and the master and crew were under direct governmental control. France protested on the ground that this was a violation of the Declaration of Paris. Though as a matter of fact no such volunteer navy was formed, there would have been no violation of the Declaration of Paris in its formation.[6] The Seventh Hague Convention of 1907 had for its purpose the regulation of conditions under which merchantmen could gain the status of auxiliary cruisers.[7] Owing to the insistence on the right of converting merchant vessels to warships on the high seas by Germany and some other powers, the English Admiralty decided to revive the practice of arming merchant vessels for defense.[8]

The status of merchantmen armed for defense is not so difficult of definition as it would seem from the present heated controversy on the subject. The test that should be applied is, not the capacity of the armament for offensive use, but the use for which it is actually intended. Is the purpose of the vessel to trade, or is it to cruise in search of prize?[9] Though resistance by the master of a neutral trading vessel is illegal,[10] resistance by the master of a belligerent merchantman has always been conceded to be a perfectly legal act.[11] This seems to be a necessary corollary to the proposition that private prop-

[3]Stark, Abolition of Privateering, 113.

[4]Baty & Morgan, War: Its Conduct and Legal Results, 336; Hooper *v.* United States (1887) 22 Ct. Cl. 408, 427 *et seq.*

[5]Declaration of Paris, Art. I. The United States did not sign or ratify the Declaration of Paris because it did not provide for the exemption from capture of private property at sea, but in the war with Spain neither country used privateers. Stockton, International Law, 48.

[6]Higgins, War and the Private Citizen, 119 *et seq.*; Stark, Abolition of Privateering, 159 *et seq.*; Higgins, The Hague Peace Conferences, 313.

[7]Seventh Hague Convention (1907) Arts. 1-6.

[8]8 American Journal of International Law, 705.

[9]According to the memorandum of the United States State Department of March 25, 1916, neutrals, for the purposes of port regulations, may presume merely from the presence of armament, in the absence of other circumstances, that vessels have lost their peaceful character; but the belligerent, before attacking such vessels without warning, must have conclusive evidence of an intention to use the armament offensively.

[10]Hall, *op. cit.*, 733.

[11]C. Dupuis, Le Droit de La Guerre Maritime, 121; 2 Oppenheim, *op. cit.*, § 181; The Catharina Elizabeth (1804) 5 C. Rob. 232, in which Lord Stowell stated that there was a broad difference between resistance by an enemy and a neutral master, the enemy master being in the position of *lupum auribus teneo*. *Cf.* 2 De Pistoye et Duverdy, Prises Maritimes, 51. The crew of a merchant vessel which resists are entitled to the status of prisoners of war. U. S. Naval War Code, Art. 10.

erty of a belligerent citizen at sea is not exempt from capture by the enemy. The position of defensively armed merchant vessels is entirely different from that of auxiliary cruisers or privateers, in that the first class is not authorized to operate offensively on pain of subjecting itself to the charge of piracy.[12] Since neutral goods in enemy ships are not confiscable, they are not forfeited by the resistance of the enemy master,—even armed resistance.[13] As respects entry and departure from neutral ports, these vessels have always been treated as trading vessels.[14] The fallacy of the German contention[15] that merchantmen of a belligerent nationality have not a right to resist capture, lies in the mistaken view that the relations of belligerent warships to neutral and enemy trading vessels are essentially the same. In reality, the neutral in resisting visit and search is resisting an act which is not hostile, while the belligerent merchant vessel is resisting a hostile act which he has a right to resist.[16]

According to the custom of international law, a belligerent merchant vessel has a right to be warned before it is sunk or captured.[17] During the period before the abolition of privateering, merchantmen rarely went unarmed.[18] It is accordingly rather convincing of the right of an armed merchantman to warning that no mention is made of any exception in their case.[19] Of course, the question of warning was of only academic interest till lately, since warships in the old days gave warning to the eye, whether they wished or not, long before they got within range. Arming of merchant vessels against privateers was effective because, defensively, privateers were weak,[20]

[12]2 Oppenheim, *op. cit.*, §§ 85, 181, 254; Hall, *op. cit.*, 525; *contra*, 15 U. S., Appendix, 7 (Wheaton's notes). No distinction is taken between armed and unarmed merchantmen. It should be noted here that according to the British instructions to armed merchantmen the guns are to be used only for defense. 162 Proceedings U. S. Naval Inst. 636. In Snow, International Law (2nd ed.) 83, the author, writing in 1890, said: "It may be reasonably expected in coming naval wars that steamers of the great mail lines will be armed so as to defend themselves from attack, rather than seek convoy, and the defense could be legitimately carried to the point of a seizure of the attacking vessel, or a recapture if once taken."

[13]The Nereide (1815) 13 U. S. 388. Some writers, *e. g.*, Twiss, The Law of Nations in Time of War, 187 and Hall, *op. cit.*, 734, have regarded The Fanny (1814) 1 Dod. 443, as *contra*. The cases, however, are clearly distinguishable, as in the former the ship was defensively armed, while The Fanny was equipped with a letter of marque and authorized to take prizes. *Cf.* The Catharina Elizabeth, *supra*.

[14]22 Revue de Droit International Public 6, 193 *d*; 2 Moore, Digest of Int. Law, 1070; see United States *v.* Quincy (1832) 31 U. S. 445, 466.

[15]Schramm, Das Prisenrecht in seiner Neuesten Gestalt, 308 (translated in Senate Doc. 332, 64th Congress, 39).

[16]8 American Journal of International Law, 715.

[17]2 Oppenheim, *op. cit.*, § 181; Stockton, International Law, § 158.

[18]The Nereide (1815) 13 U. S. 388, 426.

[19]It is true that Marshall, C. J., in The Nereide, *supra*, at p. 430, says of the ship libeled, which was an armed merchant vessel captured by an American privateer: "She is an open and declared belligerent; claiming all the rights, and subject to all the dangers of the belligerent character." It is to be noted, however, that the question of warning was not raised in the case. Moreover, the Chief Justice seems to have had in mind the effect of resistance.

[20]Hooper *v.* United States, *supra*, 437.

and the same inducement for defensive armament would apply to the case of submarines. If armed merchant vessels are not accorded the right of warning before attack, the same right might be denied to unarmed merchantmen, since they might easily sink a submarine by ramming.[21] Though submarines are defensively so weak that it is very dangerous for them to warn merchant vessels, whether armed or unarmed, this fact cannot affect the neutral rights involved.[22] Inasmuch as belligerent merchantmen are accorded the right of warning, and no distinction has ever been drawn between the rights of defensively armed and unarmed merchant vessels previous to the present war, the rules that apply to one would certainly seem to apply to the other. The German contention would subject such vessels to the risks of warships without according them any of the offensive rights of warships, such as visit, search, and capture.[23]

THE ADOPTION OF THE COMMON LAW.—The common law of England, in so far as it was suitable to new conditions, was in force in this country before 1776, and the decisions of the higher English courts were of controlling authority in the colonies.[1] After the Revolution, the so-called English common law, when it was not adopted as a system of jurisprudence by constitutional provision[2] or by statute,[3] was recognized, without legislative declaration, as part of the law of the eastern states, under the doctrine that the original law of conquered or ceded territory is in force until abrogated.[4] Of course, the common law is not uniform throughout the states. In some, the common law prior

[21]Marshall, C. J., in The Nereide, *supra,* at p. 428, in speaking of resistance to the right of search of neutral goods by the arming of a belligerent merchant vessel, says: "It is difficult to perceive in this argument any thing which does not also apply to an unarmed vessel. In both instances it is the right and the duty of the carrier to avoid capture and to prevent a search. There is no difference *except in the degree of capacity to carry this duty into effect.** The argument would operate against the rule which permits the neutral merchant to employ a belligerent vessel."

*The italics are the writer's.

[22]Johnson, J., in The Atalanta (1818) 16 U. S. 409, which affirmed the doctrine of The Nereide, *supra,* in speaking of the obstruction of the belligerent's right of search by the lading of neutral goods on board an armed belligerent carrier, said, at p. 425: "It cannot be expected that the belligerent will rest his complaint upon the humiliating ground of his inability to subdue his enemy; and if he should, the neutral may well reply it is his affair or his misfortune, but ought not in any of its consequences to affect the rights of the neutral."

[23]*Cf.* The Atalanta, *supra,* 426, 427.

[1]Black, Law of Judicial Precedent, 428; Van Ness *v.* Packard (1829) 27 U. S. 137, 144; Wheaton *v.* Peters (1834) 33 U. S. 591, 659.

[2]See Ray *v.* Sweeney (1878) 77 Ky. 1; Clawson *v.* Primrose (1873) 4 Del. Ch. 643, 652, 666.

[3]See Chilcott *v.* Hart (1896) 23 Colo. 40, 45 Pac. 391; Kreitz *v.* Behrensmeyer (1894) 149 Ill. 496, 36 N. E. 983; Reno Smelting etc. Works *v.* Stevenson (1889) 20 Nev. 269, 21 Pac. 317; Dawson *v.* Coffman (1867) 28 Ind. 20.

[4]1 Bl. Comm. *107; 1 Kent, Comm., *472; American Ins. Co. *v.* Canter (1828) 26 U. S. 511, 542. In Louisiana, however, civil matters have always been governed by the civil law, though the common law is applied in criminal procedure. State *v.* Depasse (1879) 31 La. Ann. 487.

to 1607 has been adopted;[5] in others, the Revolution marks the dividing line;[6] and still others have adopted it without reference to any date.[7] It is generally provided, furthermore, that only so much of the common law is adopted as is applicable to our circumstances and surroundings, and not inconsistent with the federal and state constitutions.[8] And, lacking such express qualifications, the courts have not hesitated to depart from common law rules that violate these conditions.[9]

An interesting dilemma was presented to the Supreme Court of Indiana by the recent case of *Ketelson* v. *Stilz* (Ind. 1916) 111 N. E. 423. In a suit to recover damages for fraud in an exchange of real estate, the appellees contended that they were released from liability by reason of a judgment obtained by the appellant against the appellees' joint tort-feasor, though execution on this judgment had been returned unsatisfied. This contention was supported on the ground that the common law of England prior to the fourth year of the reign of James I had been adopted by an Indiana statute, and that since 1606 the rule is well settled in England that a judgment against one joint tort-feasor bars an action for the same cause against another. The court, however, regarding this statute as adopting, not the common law rules as applied by the English courts prior to 1607, but rather "the general principles of the common law which underlie and control all rules of decisions throughout all time", preferred to follow the majority rule in the United States, which holds that nothing less than full satisfaction bars the plaintiff from proceeding against other

[5]See Hardage *v.* Stroope (1893) 58 Ark. 303, 24 S. W. 490; Ray *v.* Sweeney, *supra;* Chilcott *v.* Hart, *supra.*

[6]See Clawson *v.* Primrose, *supra*; Fla. Comp. Laws (1914) § 59.

[7]Sayles' Tex. Civ. Stat. (1914) Art. 5492; Neb. Rev. Stat. (1913) Art. 3697. The term "common law" may mean the rules enforced by the common law courts of England, and therefore may include the amendatory statutes prior to the colonization of America, 1 Kent, Comm., *473; Baker *v.* Crandall (1883) 78 Mo. 584; Commonwealth *v.* Leach (1804) 1 Mass. 58, or prior to the Revolution, Browning *v.* Browning (1886) 3 N. Mex. 371, 9 Pac. 677; see opinion of Dana, C. J., in Commonwealth *v.* Leach, *supra,* or it may refer solely to the unwritten law. See Levy *v.* McCartee (1832) 31 U. S. 102, 110; Chisholm *v.* Georgia (1793) 2 U. S. 419, 435; Matter of Lanphere (1886) 61 Mich. 105. Many states have expressly adopted the statutes of a general nature, applicable to our conditions, passed in aid of the common law before 1607, see Gerber *v.* Grabel (1854) 16 Ill. 217; Hardage *v.* Stroope, *supra,* or before 1776. Fla. Comp. Laws (1914) § 59.

[8]See State *v.* Akers (1914) 92 Kan. 169, 189, 140 Pac. 637, 645; Hageman *v.* Vanderdoes (1914) 15 Ariz. 312, 138 Pac. 1053.

[9]It has been held, for example, that the following English common law rules or doctrines are not applicable to our conditions: a rule of evidence which does not admit a tradesman's books unless supported by the oath of a clerk, Boyer *v.* Sweet (1841) 4 Ill. 120; the rule that a woman in an action for defamation imputing unchastity must prove special damage, Cooper *v.* Seaverns (1909) 81 Kan. 267, 105 Pac. 509; *contra,* Castleberry *v.* Kelly (1858) 26 Ga. 606; the doctrine of ancient lights, Meyers *v.* Gemmel (N. Y. 1851) 10 Barb. 537; *contra,* Clawson *v.* Primrose, *supra;* the test of navigability, State *v.* Akers, *supra;* the theory of riparian rights, Town of Brookhaven *v.* Smith (1907) 188 N. Y. 74, 80 N. E. 665; Martin *v.* Bigelow (Vt. 1827) 2 Aiken 184; Reno Smelting etc. Works *v.* Stevenson, *supra;* but see Slattery *v.* Harley (1899) 58 Neb. 575, 79 N. W. 151; and the rule that requires cattle to be fenced in. Wagner *v.* Bissell (1856) 3 Iowa 396.

joint tort-feasors. Certainly the latter rule is preferable,[10] but the authority of the English holding is beyond question in that country. And no distinction could be made on the ground that different conditions prevail in the United States. In view of the state statute, therefore, the court was obliged either to declare a harsh law, refuse to follow a well established precedent, or discover a middle way, as it did, by defining the term "English common law" and calling the English decision not binding.

It is sometimes said that decisions are not, strictly speaking, a part of the common law, but are merely evidence of what the common law is.[11] Such evidence may become more or less conclusive according to the recognition afforded to it; but there is not present, in theory at least, the binding force that characterizes a legislative enactment. With this definition of the common law, there is no difficulty in departing from the English decisions, except in so far as the doctrine of *stare decisis* is repudiated. It is true that we adopted the English common law as a system of jurisprudence,[12] but not English decisions;[13] and some of our courts have refused, therefore, to regard English decisions prior to the year when the common law was adopted as binding.[14] The majority of our courts, however, have treated such decisions as of controlling authority, and have contented themselves with declaring the law, in some cases commending its injustice to the legislature.[15] But whether these decisions are to be treated as evidence of the common law or as a part of it,[16] the courts in overriding such holdings clearly violate the doctrine of *stare decisis*, and it is this maxim, so important a rule in our system of law, that leads the courts in the second class of cases to follow the English precedents. But the rule of *stare decisis* may be qualified when the precedent is manifestly erroneous,[17] and its application is most strongly supported

[10]See Notes, p. 510.

[11]"The law consists not in the rules enforced by decisions of the courts at any one time, but [in] the principles from which these rules flow." Williams *v.* Miles (1903) 68 Neb. 463, 94 N. W. 705; Kreitz *v.* Behrensmeyer, *supra; cf.* Wilson *v.* Leary (1897) 120 N. C. 90, 26 S. E. 630.

[12]Thus in Grigsby *v.* Reib (1913) 105 Tex. 597, 153 S. W. 1124, it is held that a statute adopting the "common law of England" refers to the law as declared by the different states of the United States.

[13]Marks *v.* Morris (1809) 14 Va. 463.

[14]Sayward *v.* Carlson (1890) 1 Wash. 29, 40, 23 Pac. 830, 833; Baring *v.* Reeder (1806) 11 Va. *154, *161; Williams *v.* Miles, *supra;* see Cooper *v.* Seaverns, *supra.* English decisions subsequent to the date of adoption may be highly persuasive, but are never regarded as binding authorities. See Koontz *v.* Nabb (1860) 16 Md. 549; Cathcart *v.* Robinson (1831) 30 U. S. 264, 279. It has been remarked that the decisions of the English Privy Council, and not of the House of Lords, before 1776, should be regarded as conclusive of the common law in America. *In re* Easton's Will (1914) 80 Misc. 1, 145 N. Y. Supp. 373.

[15]Swayne *v.* Lone Acre Oil Co. (1905) 98 Tex. 597, 86 S. W. 740; Coburn *v.* Harvey (1864) 18 Wis. 156; Gerber *v.* Grabel, *supra* (and see separate opinion of Caton, J., as to time of adoption of common law); Clawson *v.* Primrose, *supra.*

[16]See Chamberlain, Stare Decisis, 17.

[17]See Black, Law of Judicial Precedent, 199; Chamberlain, Stare Decisis, 15.

when property or contract rights will be affected by its violation.[18] The decision in the principal case does not concern such rights, and, in view of the American authorities, it would appear that the court was justified in its holding.

EXPATRIATION.—The common law rule that allegiance was perpetual, and that no man had the right to expatriate himself without the consent of his native government,[1] was quite in accord with the almost universal view that there existed no inherent right of expatriation,[2] and was followed in many of the early American cases.[3] In view of the fact, however, that naturalization of aliens was encouraged in England and America, it was felt in both countries that it was illogical to refuse consent to expatriation; and hence each country has now given statutory consent thereto.[4] In most other countries this consent has likewise been accorded, by a declaration of the circumstances under which a native loses his nationality.[5] But it is an important restriction on this right, that an expatriate is not released from those obligations to his native country which have accrued before his emigration, and will be held bound to perform them, should he ever return.[6]

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[18]See Rockhill *v.* Nelson (1865) 24 Ind. 422; Kearny *v.* Buttles (1853) 1 Oh. St. 362; Treon *v.* Brown (1846) 14 Ohio 482.

[1]Proceedings against Macdonald (1747) 18 How. State Trials 858; see Calvin's Case (1608) 7 Rep. 1a, 13b, 25a; *cf. In re* Stepney Election Petition (1886) 17 Q. B. D. 54; 1 Hale, Pleas of the Crown, *68; 1 Bl. Comm. *369; Hall, International Law (6th ed.) 227.

[2]Hall, 232; Lawrence, International Law (4th ed.) § 96; Smith, International Law (4th ed.) 82.

[3]Williams' Case (C. C. 1799) 29 Fed. Cas. 1330; Ainslie *v.* Martin (1812) 9 Mass. 454; Shanks *v.* Dupont (1830) 28 U. S. 242; Hall, 230; see 13 Columbia Law Rev. 744; *contra,* Alsberry *v.* Hawkins (1839) 39 Ky. *177; 9 Op. Atty. Gen. 356 (1859); see Juando *v.* Taylor (D. C. 1818) 13 Fed. Cas. 1179; *cf.* Murray *v.* Schooner Charming Betsy (1804) 6 U. S. 64, 120.

[4]Act 33 & 34 Vict. c. 14, 6; Act 35 & 36 Vict. c. 39, 2; 15 Stat. 223. The American act characterizes expatriation as "a natural and inherent right." The Supreme Court has recently expressly refused to decide whether this is to be taken literally, or is merely the consent of our government to expatriation. Mackenzie *v.* Hare (1915) 239 U. S. 299, 309, 36 Sup. Ct. 106, 107. See 13 Columbia Law Rev. 744.

[5]8 Op. Atty. Gen. 139, 164 (1856); Hall, 232; Lawrence's Wheaton, International Law, 922; 1 Halleck, International Law (4th Eng. ed.) 436. While the Russian law is not entirely clear, it is possible that that country represents an exception. Hall, 234; Lawrence, § 96; 3 Moore, Digest of International Law, § 453.

[6]8 Op. Atty. Gen. 139, 146, 168 (1856); 9 Op. Atty. Gen. 356, 362 (1859); Davis, International Law (rev. ed.) 141, 143, 144. This question arises chiefly with reference to the duty of compulsory military training, in countries where that system obtains. If the obligation had accrued at the time of emigration, the expatriate may generally be compelled to serve, should he return to his native country. Lawrence, § 96; Lawrence's Wheaton, 922; Hall, 232. France apparently compels service, even if the emigration occurred before the obligation accrued. 3 Moore, 599. Under the present German law, a German who has resided abroad for ten years can be com-

For many years the United States has made a practice of settling questions of expatriation by treaties conceding and to a certain degree regulating the right.[7]

It is not, however, entirely settled in this country what acts constitute expatriation. Here, as in England,[8] and elsewhere generally,[9] it is unquestionably true that foreign naturalization, or the taking of an oath of allegiance to another country, expatriates a citizen.[10] While it has also been said that mere residence abroad, with intent to remain, is sufficient to work expatriation,[11] the better view seems to be that this is insufficient, and there must be, in addition, at least an intent to throw off the native allegiance.[12] On the other hand, it has often been held that there can be no expatriation without a change of domicil;[13] but this is apparently now not absolutely indispensable,[14] and there would seem to be no good reason why it should be accorded more than an evidentiary value. It is clear that the act of expatriation must be voluntary;[15] but, though the legislature cannot, by an arbitrary law, declare a person expatriated,[16] it may provide that the voluntary commission of a specific act by an individual

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pelled to serve in the army only in time of war, and apparently not at all, if he returns only for a transient visit. See *Ex parte* Weber [1916] 1 K. B. 280, aff'd in the House of Lords (1916) 32 T. L. R. 312.

[7]Malloy, United States Treaties, 45, 53, 60, 62, 80, 384, 434, 691, 698, 939, 949, 958, 1132, 1298, 1449, 1468, 1570, 1758, 1760, 1829, 1895, 1897; Charles, United States Treaties, 19, 23, 95. There are no treaties on this subject with Russia, France, or Italy.

[8]Act 33 & 34 Vict. c. 14, 6.

[9]Hall, 232; 1 Halleck, 436.

[10]34 Stat. 1228, § 2; Browne *v.* Dexter (1884) 66 Cal. 39; Jennes *v.* Landes (C. C. 1897) 84 Fed. 73. It has been said that naturalization in a foreign country is essential to expatriation, Jennes *v.* Landes, *supra*; 9 Op. Atty. Gen. 356, 359 (1859); see Ludlam *v.* Ludlam (1863) 26 N. Y. 356, 374; *contra*, Caignet *v.* Pettit (Pa. 1795) 2 Dall. 234; 14 Op. Atty. Gen. 295 (1873); but there would seem to be no good reason for this view. A qualified oath of allegiance, which does not involve a renunciation of native citizenship, may not cause expatriation. 3 Moore, § 468.

[11]*cf.* Lorenzo *v.* McCoy (1910) 15 Philippine 559, 590; Alsberry *v.* Hawkins, *supra*. It seems to be sufficient according to the law of several European countries. 1 Halleck, 436; Lawrence's Wheaton, 922. The acquisition of a foreign domicil, without the intent to return, expatriates a Frenchman. 14 Op. Atty. Gen. 295, 300 (1873); Lawrence's Wheaton, 922. The present German law declares any German who resides abroad for ten years expatriated, but redintegration is not difficult. See *Ex parte* Weber, *supra*.

[12]9 Op. Atty. Gen. 62 (1857); 14 Op. Atty. Gen. 295 (1873); State *v.* Adams (1876) 45 Iowa 99; State *ex rel.* Phelps *v.* Jackson (1907) 79 Vt. 504, 65 Atl. 657; Hammerstein *v.* Lyne (D. C. 1912) 200 Fed. 165, 171; see Juando *v.* Taylor, *supra*.

[13]Comitis *v.* Parkerson (C. C. 1893) 56 Fed. 556; Fish *v.* Stoughton (N. Y. 1801) 2 Johns. Cas. *407; 14 Op. Atty. Gen. 295 (1873); see Talbot *v.* Janson (1795) 3 U. S. 133, 169; The Santissima Trinidad (1822) 20 U. S. 283, 347.

[14]At least, not when an American woman marries a domiciled alien. Mackenzie *v.* Hare, *supra*.

[15]Jennes *v.* Landes, *supra*; Hardy *v.* DeLeon (1849) 5 Tex. *211, *235.

[16]See Burkett *v.* McCarty (1866) 73 Ky. 758; Mackenzie *v.* Hare, *supra*.

shall deprive him of his rights of citizenship.[17] Merely entering the military or naval service of a foreign nation is insufficient to cause expatriation.[18]

Under certain circumstances, the right to sever one's native allegiance is withheld. Thus, expatriation may not be made the cover for fraud;[19] nor may it be employed as the means or the excuse for the commission of a crime against the native country.[20] During a war in which the country is engaged, the right is entirely proscribed.[21] And a minor, by his own voluntary act, cannot expatriate himself; on reaching his majority, he is entitled to elect between the citizenship of the country of his birth and that of the country of his residence.[22]

A recognition of the tendency of a naturalized citizen to return to his native country,[23] has led to the introduction into the naturalization treaties to which the United States is a party of provisions that, when a naturalized citizen returns to the country of his original allegiance, intending to remain, he becomes expatriated; and most of the treaties provide that residence for two years there may be considered as *prima facie* evidence of such intention.[24] By an act[25] passed in 1907, two years' residence in the native country, or five years' residence in any other foreign country, is declared to raise the presumption of loss of citizenship. Construing this act in the recent case of *United States ex rel. Anderson* v. *Howe* (D. C., S. D. N. Y. 1916) 55 N. Y. L. J. 89, where the relator, a native of Sweden, naturalized in the United States, returned to Sweden and lived there more than two years, the court held that, in the absence of proof to the contrary, he was to be considered as expatriated and an alien. This decision overrules an Opinion of Mr. Attorney-General Wickersham,[26] who took the view that the presumption of non-citizenship in the Act of 1907 was meant only to relieve our government of the duty of protecting a citizen abroad after such two years' residence, and that, since the

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[17]For instance, the commission of a crime, such as desertion from the army, Huber *v.* Reily (1866) 53 Pa. 112; State *v.* Symonds (1869) 57 Me. 148; Wilson, International Law, § 46; *cf.* Burkett *v.* McCarty, *supra*, or the marriage of an American woman to a foreigner. Mackenzie *v.* Hare, *supra*; see 13 Columbia Law Rev. 744. The latter is the rule almost everywhere. Hall, 226.

[18]Wilson, § 46; 3 Moore, § 469. The Netherlands holds it sufficient. Wilson, § 46.

[19]See The Santissima Trinidad, *supra*, 348; Alsberry *v.* Hawkins, *supra*; *cf.* 14 Op. Atty. Gen. 295 (1873).

[20]Talbot *v.* Janson, *supra*, 165; The Santissima Trinidad, *supra*, 348; 8 Op. Atty. Gen. 139, 146, 168 (1856).

[21]34 Stat. 1228, § 2; Rex *v.* Lynch [1903] 1 K. B. 444; see The Dos Hermanos (1817) 15 U. S. 76, 98; *cf.* 8 Op. Atty. Gen. 139, 168 (1856).

[22]State *ex rel.* Phelps *v.* Jackson, *supra*; Lim Teco *v.* Insular Collector of Customs (1913) 24 Philippine 84; Hall, 222; *cf.* 34 Stat. 1229, § 6. This right of election seems to have existed even under the strict common law rule. See Ludlam *v.* Ludlam, *supra*, 372.

[23]*Cf.* 34 Stat. 601, § 15.

[24]Malloy, United States Treaties, *supra*; Charles, United States Treaties, *supra*.

[25]34 Stat. 1228.

[26]28 Op. Atty. Gen. 504 (1910).

necessity for this protection ceased on his return to America, the presumption ceased with it. The court's interpretation of the statute accurately follows its words, and appears to be unquestionably the proper one.

Recovery for Unauthorized Repetition of Slander by Third Persons.—In actions for defamation, it has been settled by the courts and agreed by the text writers that the plaintiff cannot receive compensation for the damage which he sustains by reason of the repetition of the defamation by the hearer to another person, whether the words be actionable *per se*[1] or only on proof of special damage.[2] But to this generally recognized rule there are equally well recognized exceptions. The originator of the slander or libel is responsible for its repetition if he authorizes it,[3] or if he intends it,[4] or if the hearer is under such a duty to repeat it that the repetition is privileged.[5] Under the general rule, a recovery is denied for the repetition sometimes on the ground that to allow it would be to create a double liability, giving the plaintiff two actions for the same injury, one against the originator and one against the repeater;[6] for the repeater, unless his repetition is privileged, is at all events responsible for the consequences of his utterance.[7] But the reason usually advanced is that the repetition is not a natural, proximate, and reasonable result of the original utterance, but is an independent wrong committed by a third person, for which that third person is alone responsible.[8]

The first ground assigned in support of the general rule is hardly tenable. It amounts in effect to this: the first publisher is held liable, if the repeater is exempt; and the first publisher is exempt, if the repeater is liable. But the liability of one person cannot depend upon the non-liability of another. The responsibility of the originator

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[1]Prime *v.* Eastwood (1877) 45 Iowa 640; Clifford *v.* Cochrane (1882) 10 Ill. App. 570; see Adams *v.* Cameron (Cal. 1915) 150 Pac. 1005.

[2]Odgers, Libel and Slander (5th ed.) 172, 177; Ward *v.* Weeks (1830) 7 Bing. 211; Age-Herald Pub. Co. *v.* Waterman (1914) 188 Ala. 272, 66 So. 16.

[3]Bond *v.* Douglas (1836) 7 C. & P. 626; Queen *v.* Cooper (1846) 8 Q. B. 533; Adams *v.* Kelly (1824) Ry. & Moo. 157.

[4]Ecklin *v.* Little (1890) 6 T. L. R. 366; Whitney *v.* Moignard (1890) 24 Q. B. D. 630; Odgers, Libel and Slander (5th ed.) 177.

[5]Clerk and Lindsell, Torts (6th ed.) 618, 673; Derry *v.* Handley (1867) 16 L. T. R. [N. S.] 263; but *cf.* Parkins *v.* Scott (1862) 6 L. T. R. [N. S.] 394.

[6]Mills *v.* Flynn (1912) 157 Iowa 477, 137 N. W. 1082; see Cates *v.* Kellogg (1857) 9 Ind. 506.

[7]In the Earl of Northampton's Case (1613) 12 Rep. 132, it was laid down as the rule that if at the time of his repetition the repeater of the defamatory words named the author, the former was not liable to any action. The reason upon which the rule was based was that, by naming the author of the slander, the repeater gave to the injured party the opportunity to bring an action against him. But the doctrine was criticized in later cases, and was finally repudiated in McPherson *v.* Daniels (1829) 10 B. & C. 263. It is now the law that the repeater of the slander cannot defend on the ground that, at the time of his utterance, he named the person from whom he heard it. Newell, Slander and Libel (3rd ed.) § 435 *et seq.*; see 15 Columbia Law Rev. 361.

[8]Terwilliger *v.* Wands (1858) 17 N. Y. 54; Gough *v.* Goldsmith (1878) 44 Wis. 262; Ward *v.* Weeks, *supra*.

of the slander should not be determined by deciding whether the repetition is or is not justifiable.[9] Nor is there anything obnoxious in allowing a plaintiff to hold several persons responsible for the injury he has sustained. Cases of such double liability are not infrequent in the law of torts.[10] Whether the first publisher is responsible for the repetition must be determined by the rule ordinarily applied in tort actions, that a wrongdoer is responsible for the natural and ordinary consequences of his wrongful act, but not for the remote.[11] When one person utters a slander against another, the frailty of human nature is such that it would be, indeed, a highly unnatural result if the hearer did not repeat the scandal. The publisher of any defamation, as a reasonable man, may well anticipate such repetition. On principle, therefore, the first publisher of a defamatory statement is liable for the repetition of that defamation which follows as a natural and proximate result of the first publication. Such is the decision of the court in the recent case of *Southwestern Tel. & Tel. Co.* v. *Long* (Tex. Civ. App. 1916) 183 S. W. 421. Here the words alleged as slanderous were actionable *per se*, since they imputed unchastity to the plaintiff.[12] The distinction which the court made, however, between cases of slander *per se* and those in which special damages must be shown, in which latter case it was said there could be no recovery for damages resulting from the repetition, seems hardly sound; for there is even greater likelihood of repetition in the latter case than in former. Though the result reached in this decision is opposed to the great weight of authority, there are a few cases which support it.[13] Since ordinarily in tort actions it is a

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[9]Townshend, Slander and Libel)4th ed.) 274 *et seq.*; Odgers, Libel and Slander (5th ed.) 415; see Elmer *v.* Fessenden (1890) 151 Mass. 359, 24 N. E. 208.

[10]4 Sutherland, Damages (3rd ed.) § 1222. Mr. Sutherland gives this example: A and B are engaged to be married. C slanders B, as a result of which A breaks his promise. B may sue A for breach of promise, or B may sue C for slander. If B sues C, B may recover damages which include compensation for A's breach of promise.

[11]"*In jure non remota causa sed proxima spectatur.*" Bacon, Maxims of the Law, Reg. I. The intervening wrong of a third person does not necessarily discharge the first wrongdoer from liability. Lane *v.* Atlantic Works (1872) 111 Mass. 136.

[12]At common law, the imputation of unchastity to a female was not actionable, unless special damage was shown, Brooker *v.* Coffin (N. Y. 1809) 5 Johns. *188; Pollard *v.* Lyon (1875) 91 U. S. 225, because fornication was an offense unknown to the law and cognizable only in the ecclesiastical courts. Palmer *v.* Thorpe (1578) 4 Rep. 20; Davis *v.* Gardiner (1578) *id.* 16. Though that rule was strongly criticized, Graves *v.* Blanchett (1704) 6 Mod. *148; Speight *v.* Gosnay (1891) 60 L. J. Q. B. 231, and called "unsatisfactory" and even "barbarous", *per* Lords Campbell and Brougham, in Lynch *v.* Knight (1861) 9 H. L. C. *577, at pp. *593, *594, it was not changed in England until 1891, when the Slander of Women Act, 54 & 55 Vict. c. 51, made the words actionable *per se*. In the United States, the words are generally actionable *per se*, either by statute or by decision. Burdick, Torts (3rd ed.) § 368.

[13]Davis *v.* Starrett (1903) 97 Me. 568, 576, 55 Atl. 516, 519; Zier *v.* Hofflin (1885) 33 Minn. 66, 21 N. W. 862; Merchant's Ins. Co. *v.* Buckner (1899) 98 Fed. 222; Fitzgerald *v.* Young (1911) 89 Neb. 693, 132 N. W. 127; see Clerk and Lindsell, Torts (6th ed.) 674; 4 Sutherland, Damages (3rd ed.) § 1222; *cf.* Riding *v.* Smith (1876) 1 Ex. D. 91, 94; Burdick, Torts (3rd ed.) § 350.

question for the jury whether a particular consequence is the natural and proximate result of the wrongdoer's act,[14] so too, in these cases of defamation, it might well be left to the jury to say whether the repetition was the natural and proximate result of the first publication.[15]

With all this strict insistence by the majority of courts on the defendant's non-liability for repetitions, there is this apparent inconsistency in the cases. Where the words are actionable *per se*, the amount of damages which the plaintiff may recover is in the discretion of the jury, which compensates the plaintiff for the loss to his reputation;[16] but this loss of reputation results ordinarily through repetitions by third parties. Then, too, in some cases of defamation where special damage is alleged to the plaintiff's business, the plaintiff is allowed to prove and recover for the general loss of business;[17] but, again, this general loss of business can come only through repetitions. The decision in *Southwestern Tel. & Tel. Co.* v. *Long* obviates this logical difficulty, and reaches a conclusion which, though opposed to the great weight of the decided cases, is entirely consistent with the principles of justice and of law.

MANDATORY INJUNCTIONS, AND THEIR EFFECT PENDING APPEAL.—The jurisdiction of the court of chancery by way of mandatory injunction seems to have been recognized early in the development of the equitable remedy. Lord Hardwicke, in a case which has apparently been overlooked or underestimated, directly commanded the defendant, upon final decree, to remove a wall which he had erected in violation of the petitioner's easement of light;[1] in a later case, he made a similar order on motion.[2] But the courts have preferred to regard as the leading decision on the subject a case in which the mandatory nature of the injunction granted is very doubtful.[3] In that case the order, made on motion, was couched in the form of a prohibition on the

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[14]Lane *v.* Atlantic Works, *supra.*

[15]Bigley *v.* National Fidelity & Casualty Co. (1913) 94 Neb. 813, 144 N. W. 810; Zier *v.* Hofflin, *supra*; Fitzgerald *v.* Young, *supra.*

[16]Melcher *v.* Beeler (1910) 48 Colo. 233, 110 Pac. 181; Burt *v.* McBain (1874) 29 Mich. 260; 4 Sutherland, Damages (3rd ed.) § 1206.

[17]Evans *v.* Harries (1856) 1 H. & N. 250; Riding *v.* Smith, *supra*; *cf.* Ratcliffe *v.* Evans (1892) 2 Q. B. 524; but see Rutherford *v.* Evans (1829) 4 C. & P. 74. In Clarke *v.* Morgan (1877) 38 L. T. R. [N. S.] 354, the court pointed out the logical difficulty involved, and expressed the hope that a court of ultimate appeal would consider the question.

[1]"Upon the whole, I must decree the wall erected by the defendant be pulled down." East India Co. *v.* Vincent (1740) 2 Atk. *83.

[2]Ryder *v.* Bentham (1750) 1 Ves. Sr. *543. The Chancellor, before hearing the argument, observed that "he never knew an order to pull down anything on motion: it is sometimes, though rarely, done on a decree." But, after argument: "Let the parties therefore by consent proceed to a trial at law in case by the plaintiff, for stopping his lights: and the defendant to pull down the scaffold, or polls and boards already raised, and be injoined from building or erecting, whereby any of plaintiff's lights may be obstructed, till after trial had."

[3]Robinson *v.* Lord Byron (1785) 1 Bro. C. C. 588.

defendant.[4] The form was followed by Lord Eldon, who doubted the power of the court to issue an order expressly calling for an affirmative act, but effected the same result by restraining the defendant from refusing to do the act demanded.[5] While there does not appear to have been any doubt concerning the power of equity to command the doing of an act in this evasive way, the earlier decisions manifest a tendency toward great caution in the awarding of the mandatory injunction, treating it as a remedy to be employed only in extreme cases of irreparable injury.[6] But a great equity judge refused to admit that there was cause for any more hesitancy in awarding a mandatory than a preventive injunction,[7] and the traces of the earlier theory may now be seen only in the reluctance of a few courts to give such relief before final decree.[8] Equity will command an affirmative act whenever the circumstances warrant,[9] and the tendency of the modern decisions is to abandon the evasive form adopted by Lord Eldon and followed in many other cases,[10] and to issue the direct order in so many words.[11]

Nevertheless, the custom of awarding the injunction in the restrictive form is firmly established in many American jurisdictions, and has often made the task of determining the nature of a decree very difficult. This is well illustrated by the recent case of *United Railroads of San Francisco* v. *Superior Court* (Cal. 1916) 155 Pac. 463. The plaintiff had sought to enjoin the city of San Francisco from operating on tracks owned by the city in common with the plaintiff a greater number of cars than it was entitled by contract to use. A temporary injunction was granted; the city appealed, and continued to use the property as before, whereupon the plaintiff instituted proceedings to punish the mayor and other officials for contempt. The court decided for the plaintiff, one judge dissenting on the ground that the injunction was mandatory.

It is generally recognized that an appeal from a prohibitory injunction, *i. e.*, one which restrains the defendant from disturbing the

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[4]The injunction granted was "to restrain Lord Byron from using dams, wears, shuttles, floodgates, and other erections, otherwise than he had done before the 4th of April, 1785, so as to prevent the water flowing to the mill, in such regular quantities as it had ordinarily done before the 4th of April." This would seem to be an ordinary case of prohibitory injunction. See Rogers Locomotive etc. Works *v.* Erie Ry. (1869) 20 N. J. Eq. 379, 389.

[5]Lane *v.* Newdigate (1804) 10 Ves. 192.

[6]Isenberg *v.* East India etc. Co. (1863) 3 De Gex, J. & S. *263; Durell *v.* Pritchard (1865) L. R. 1 Ch. 244.

[7]Sir George Jessel in Smith *v.* Smith (1875) L. R. 20 Eq. 500.

[8]Bailey *v.* Schnitzius (1888) 45 N. J. Eq. 178, 13 Atl. 247; Tebo *v.* Hazel (Del. Ch. 1909) 74 Atl. 841; *cf.* Ryder v. Bentham, *supra*; Lane *v.* Newdigate, *supra*.

[9]But see Lexington etc. Bank *v.* Guynn (1869) 69 Ky. 486.

[10]Earl of Mexborough *v.* Bower (1843) 7 Beav. 127; Hervey *v.* Smith (1855) 1 Kay & J. 389; Lawrence *v.* Horton (1890) 62 L. T. R. [N. S.] 749; Cole Silver Mining Co. *v.* Virginia etc. Water Co. (C. C. 1871) 1 Saw. 470, 482.

[11]Jackson *v.* Normanby Brick Co. [1899] 1 Ch. 438; Western Union Tel. Co. *v.* Postal Tel. Co. (9 C. C. A. 1914) 217 Fed. 533.

status quo, does not operate as a stay of the decree.[12] The effect of an appeal and *supersedeas* in such a case is merely to restrain the plaintiff from taking affirmative action to enforce his judgment;[13] it does not nullify the injunction or authorize the appellant to do what the decree forbids his doing;[14] otherwise the right to arrest the action of one committing irreparable damage could be easily defeated by taking an appeal and consummating what was intended before it could be acted upon by the higher court.[15] But the enforcement of a mandatory injunction results in a change in the condition of the *res,* for which the appellant, even if he succeeds, may be unable to recover adequate compensation; therefore, the latter type of injunction is suspended by the appeal.[16] As a result, the question whether an injunction is mandatory or preventive in its nature becomes very important, and the problem is complicated by the prohibitory form in which the mandate is frequently couched. It has been decided that the completion of the act sought to be restrained before the granting of the injunction does not make the injunction mandatory, though the defendant is indirectly ordered thereby to undo what he has done,[17] and that where the main purpose of the injunction is to command an act, it is mandatory, and is therefore suspended by an appeal, notwithstanding the fact that it incidentally imposes a restraint.[18] In *United Railroads of San Francisco* v. *Superior Court,* the dissenting judge adopted the view that the injunction was mandatory because it required the defendant to surrender possession.[19] This requirement, however, is by no means decisive of the question.[20]

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[12]Genet *v.* President etc. of D. & H. C. Co. (1889) 113 N. Y. 472, 21 N. E. 390; Green *v.* Griffin (1886) 95 N. C. 50; see Barnes *v.* Chicago Typographical Union (1908) 232 Ill. 402, 83 N. E. 932.

[13]See Pennsylvania R. R. *v.* National Docks etc. Ry. (1896) 54 N. J. Eq. 647, 35 Atl. 433.

[14]Green Bay etc. Canal Co. *v.* Norrie (2 C. C. A. 1904) 128 Fed. 896; Kentucky etc. Bridge Co. *v.* Krieger (1891) 91 Ky. 625, 16 S. W. 824; Ft. Worth Driving Club *v.* Ft. Worth Fair Assn. (1909) 56 Tex. Civ. App. 162, 121 S. W. 213; see Leonard *v.* Ozark Land Co. (1885) 115 U. S. 465, 6 Sup. Ct. 127. Where defendant had taken an appeal and procured an order staying plaintiff from any execution of his judgment pending appeal, *held,* defendant's disobedience of the injunction was punishable as contempt. Sixth Avenue R. R. *v.* Gilbert etc. R. R. (1877) 71 N. Y. 430; *contra,* Powell *v.* Florida Land etc. Co. (1899) 41 Fla. 494, 26 So. 700; see Blondheim *v.* Moore (1857) 11 Md. 365.

[15]See Green *v.* Griffin, *supra.*

[16]Clute *v.* Superior Ct. (1908) 155 Cal. 15, 99 Pac. 362; see Green Bay etc. Canal Co. *v.* Norrie, *supra*; Maloney *v.* King (1902) 26 Mont. 487, 68 Pac. 1012.

[17]Florida Yellow Pine Co. *v.* Flint River etc. Co. (1913) 140 Ga. 321, 78 S. E. 900; see Longwood Valley R. R. *v.* Baker (1876) 27 N. J. Eq. 166; but *cf.* Central Trust Co. *v.* Moran (1894) 56 Minn. 188, 57 N. W. 471.

[18]Mark *v.* Superior Ct. (1900) 129 Cal. 1, 61 Pac. 436. But the mandatory part of an essentially preventive injunction is stayed by an appeal. See Maloney *v.* King, *supra.*

[19]Clute *v.* Superior Ct., *supra.*

[20]*Cf.* Merchants etc. Co. *v.* Granger (1908) 132 Ga. 167, 63 S. E. 700; Green Bay etc. Canal Co. *v.* Norrie, *supra.*

Effect of Judgment Against One Joint Tort-Feasor on the Liability of Another.—It was early settled in England that judgment and satisfaction against one of several joint tort-feasors is a bar to an action against another for the same cause,[1] and this has always been the law in the United States.[2] The case of *Brown* v. *Wootton*, decided in England in 1606,[3] is regarded as having established the rule there that the mere recovery of judgment against a tort-feasor operates to discharge another joint tort-feasor from liability.[4] Up to the time of this decision this point does not seem to have been expressly passed on. Though for a time the rule in *Brown* v. *Wootton* was not always recognized,[5] it has since been followed, and is law in England today.[6]

While some of the earlier decisions in this country followed the English view,[7] Virginia is the only state at the present time which unqualifiedly adheres to it.[8] A doctrine which was upheld in many of the states at an early period is, that an injured party may have separate actions and recover separate judgments against each joint wrongdoer, and may then elect *de melioribus damnis*, but that his taking out execution against one of the tort-feasors, whether satisfied or not, constitutes a final election not to proceed against the others.[9] However, this rule is not in force at the present time in any jurisdiction, with the exception perhaps of Michigan.[10] The great majority of the courts in this country, adopting a rule which seems to be far sounder on principles of law and justice than the rule in England, have decided that nothing short of full satisfaction or its equivalent against a tort-feasor will bar a party from proceeding against other joint wrongdoers who were not parties to the first judgment.[11] Partial satisfac-

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[1]Morton's Case (1584) Cro. Eliz. 30; Cocke *v.* Jennor (1614) Hobart 66.

[2]Duane *v.* Goodall (1863) Fed. Cas. No. 4105; McCoy *v.* Louisville & N. R. R. (1905) 146 Ala. 333, 40 So. 106; Mitchell *v.* Libbey (1851) 33 Me. 74; Kasson *v.* People (N. Y. 1864) 44 Barb. 347.

[3]Cro. Jac. 73.

[4]Though the plaintiff in this case had levied execution in addition to recovering judgment, the court put their decision on the ground that the judgment alone was a bar.

[5]See Corbet *v.* Barnes (1636) W. Jones 377; Cocke *v.* Jennor, *supra*.

[6]Day *v.* Porter (1838) 2 Moody & R. 151; Brinsmead *v.* Harrison (1872) L. R. 7 C. P. 547.

[7]Gray *v.* Nations (1839) 1 Ark. *557; Wilkes *v.* Jackson (1808) 12 Va. 355; see Holden *v.* Reed (N. H. 1809) Smith 278.

[8]Petticolas *v.* Richmond (1897) 95 Va. 456, 28 S. E. 566. In Rhode Island, the court decided, in an early case, that judgment in trover against one of two joint tort-feasors is a bar to an action against another. Hunt *v.* Bates (1862) 7 R. I. 217. While this holding has not been overruled, it has been strictly confined to cases of trover and trespass for taking property. Parmenter *v.* Barstow (1899) 21 R. I. 410, 43 Atl. 1035.

[9]White *v.* Philbrick (1827) 5 Me. 147, overruled in Cleveland *v.* City of Bangor (1895) 87 Me. 259, 32 Atl. 892; see Livingston *v.* Bishop (N. Y. 1806) 1 Johns. *290.

[10]Kenyon *v.* Woodruff (1876) 33 Mich. 310; see Blackman *v.* Simpson (1899) 120 Mich. 377.

[11]Lovejoy *v.* Murray (1865) 70 U. S. 1; Sheldon *v.* Kibbe (1819) 3 Conn. 214; Hunt *v.* New York N. H. & H. R. R. (1912) 212 Mass. 102, 98 N. E. 787. Payment of judgment into court by one joint tort-feasor without the plaintiff's assent does not preclude the plaintiff from proceeding against the others. See 3 Columbia Law Rev. 214.

tion operates only as an extinguishment *pro tanto* of the damages recoverable against the other joint wrongdoers.[12] This view is well illustrated in the recent case of *Ketelson* v. *Stilz* (Ind. 1916) 111 N. E. 423. There the plaintiff brought an action in tort against the defendant, who demurred on the ground that the plaintiff had already recovered judgment and sued out execution against a joint tort-feasor. The execution had been returned *nulla bona.* The court held that the plaintiff was entitled to proceed until she obtained full satisfaction, overruling previous decisions that judgment and execution, without satisfaction, were a bar.[13]

It is submitted that none of the grounds on which the English doctrine rests is satisfactory. One of them is, that the rendition of judgment changes the damages, which before were uncertain, into certainty; the claim consequently becomes merged in the judgment, and thus the right of action against the others is taken away.[14] In this country, however, it is held that, inasmuch as joint tort-feasors are not only jointly but also severally liable,[15] the rendering of judgment against one of them does not merge the cause of action against the others any more than in the case of joint and several contractors.[16] A second ground on which the decisions in England are based is that, in cases of trespass or trover for taking property, the mere rendering of judgment transfers the title in the goods to the defendant, by relation back as from the time of the conversion, and that therefore the plaintiff may not maintain any further action for that which is not his.[17] But it is almost universally held in the United States that judgment alone against one who has converted goods does not vest the property in the defendant, but that satisfaction also is necessary.[18] It is said that to allow a number of judgments would in effect encourage any number of vexatious actions wherever there happen to

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[12]Murray *v.* Lovejoy (C. C. 1863) Fed. Cas. No. 9963; Brison *v.* Dougherty (1873) 62 Tenn. 93.

[13]Allen *v.* Wheatly (Ind. 1834) 3 Blackf. *332; Ashcraft *v.* Knoblock (1896) 146 Ind. 169, 175, 45 N. E. 69.

[14]Brown *v.* Wootton (1606) Cro. Jac. 73; Brinsmead *v.* Harrison, *supra.* The English courts seem to regard a joint tort as in nature like a joint contract, except that there can be no contribution as between joint wrongdoers, and that consequently one of several joint wrongdoers has no right to complain if the others are not joined in the action. See King *v.* Hoare (1844) 13 M. & W. *494; 7 Albany Law Journal, 81. Judgment against one joint obligor, without satisfaction, is everywhere a bar to an action against another. King *v.* Hoare, *supra;* see Mason *v.* Eldred (1867) 73 U. S. 231.

[15]1 Cooley, Law of Torts (3rd ed.) 224; see Hayden *v.* Woods (1884) 16 Neb. 306.

[16]Miller, J., in Lovejoy *v.* Murray, *supra,* at p. 16, speaking of the English doctrine, says: "We apprehend that no sound jurist would attempt, at this day, to defend it solely on the ground of *transit in rem judicatam.*"

[17]Fenner, in Brown *v.* Wootton, *supra,* said: "In case of trespass, after the judgment given, the property of the goods is changed, so as he may not seize them again." See Buckland *v.* Johnson (1854) 15 C. B. *145; *cf.* Adams *v.* Broughton (1737) 2 Str. *1078; *contra,* Brinsmead *v.* Harrison (1871) L. R. 6 C. P. *584. This argument, of course, is applicable only to torts involving the taking or converting of property. See Parmenter *v.* Barstow, *supra;* Lovejoy *v.* Murray, *supra,* at p. 13.

[18]Spivey *v.* Morris (1850) 18 Ala. 254; Atwater *v.* Tupper (1877) 45 Conn. 144; Osterhout *v.* Roberts (N. Y. 1827) 8 Cow. *43.

be several joint wrongdoers.[19] However, there is no good reason for denying a rule, sound in principle, simply because that rule might be abused.[20]

Relinquishment of Expectant Estate by Heir.—There is a diversity of opinion among American courts as to what force is to be attached to a release to the ancestor of an heir's expectancy in consideration of a present advance. It seems clear that such a release should have no effect in law, since only such rights are thereby passed as the releasor has at the time the release is made.[1] It is an elementary principle of common law that no one can be the heir of the living. It would therefore seem that no child should be able to release or quitclaim at law his interest in his parent's estate, since, as he may not be heir, he has nothing to release or quitclaim.[2] However, the effect of this common law rule is modified by the law of advancements and by the interference of equity.[3]

An advancement is an irrevocable gift *in praesenti* of real or personal property to a child by a parent to enable the donee to anticipate his inheritance to the extent of the gift.[4] There is a presumption that a substantial surrender of money or property by a parent to a child is intended to be an advancement chargeable to the child in the distribution of the parent's estate.[5] It is held that a release of all claims against the ancestor's estate, though void as a release, clearly shows an intent to make an advancement.[6] In a few instances, courts of

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[19]Kelly, C. B., in Brinsmead *v.* Harrison, *supra.* This reason would apply equally well in the case of joint and several contracts. Nevertheless, even in England, only full satisfaction bars an obligee from proceeding against joint and several obligors.

[20]See discussion of the English view in Freeman, Judgments (3rd ed.) § 236.

[1]Headrick *v.* McDowell (1903) 102 Va. 124, 43 S. E. 804; Co. Lit. 265: "But here in the case which Littleton puts where the sonne release in the life of his father, this release is void, (*a*) because he hath no right at all at the time of the release made, but all the right was at that time in the father; but after the decease of the father, the sonne shall enter into the land against his own release."

[2]Cass *v.* Brown (1894) 68 N. H. 85, 44 Atl. 86.

[3]But contracts by which the heir attempts to convey to a third party his expectancy are often held to be void both in law and in equity as a fraud on the ancestor, Boynton *v.* Hubbard (1810) 7 Mass. 112, unless made with the ancestor's consent. Fitch *v.* Fitch (1829) 25 Mass. 480; but see Hale *v.* Hollon (1897) 90 Tex. 427, 39 S. W. 287. The fact that the ancestor is insane and incapable of giving his consent does not alter this rule. McClure *v.* Raben (1892) 133 Ind. 507, 33 N. E. 275; *contra*, Hale *v.* Hollon, *supra.*

[4]Asgood *v.* Breed (1821) 17 Mass. 356; see Gary *v.* Newton (1903) 201 Ill. 170, 66 N. E. 267.

[5]Hatch *v.* Straight (1819) 3 Conn. 31; Scott *v.* Scott (1805) 1 Mass. 527; Sanford *v.* Sanford (N. Y. 1872) 61 Barb. 293.

[6]Headrick *v.* McDowell, *supra*; Elliott *v.* Leslie (1907) 124 Ky. 553, 99 S. E. 619; Cannon *v.* Nowell (1859) 51 N. C. 436. But the doctrine of advancements does not apply to cases of unintentional partial intestacy. Needles's Ex'r. *v.* Needles (1857) 7 Oh. St. 432.

law, desirous of giving complete effect to the agreement between the parent and the child, have overreached this presumption and held the payment made in consideration of a deed of release to be an advancement in full, barring the heir under the statutes regulating advancements, though the amount advanced was only part of the grantee's proportionate share of the estate.[7] To justify the holding in the latter cases, the courts have urged that, since a present advance may be advantageous to the heir, he and the parent may agree on a certain sum, the present use of which shall be deemed equivalent to a full distributive share of the estate at the death of the parent. Suffice it to say that this theory finds no support in the law of advancements, which is so strictly confined to the actual sum paid to the heir by the parent that no interest is allowed on the advancement brought into hotchpot.[8]

In equity, however, it seems that, where the intention of the parties is clear, consideration given, and no fraud involved, the renunciation of one's rights as heir should be enforced.[9] The assumption of jurisdiction by equity seems to be on one of two grounds. Where the heir contracts not to assert any claim against the estate of the parent in consideration of the advance, equity will enforce that contract seemingly to avoid circuity of action.[10] In the recent case of *Boyer* v. *Boyer* (Ind. App. 1916) 111 N. E. 952, the court similarly enforced a release by a son of all rights in his father's estate. This decision is in accord with the general rule that the form of the instrument, whether release, receipt in full, covenant, or contract, is immaterial.[11] Equity construes the release, which can have no operation as such, as a contract, in order to carry out the intention of the parties.[12] Secondly, even when not assuming to enforce any contract, the court nevertheless may hold that an heir who accepts and uses an advancement is estopped to deny the validity of the release under which he received it.[13] The estoppel operates with special force if the heir has misled the grantor by fraudulent conduct.[14]

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[7]Quarles *v.* Quarles (1808) 4 Mass. 680; see Power's Appeal (1869) 63 Pa. 443. It may be noted that the courts of Massachusetts and Pennsylvania did not have wide equitable powers, and hence, if in these cases they had not extended the doctrine of advancements, they might have been unable to give full effect to the releases.

[8]Asgood *v.* Breed, *supra.*

[9]Havens *v.* Thompson (1875) 26 N. J. Eq. 383; but see McCall's Adm'r. *v.* Hampton (1895) 98 Ky. 166, 32 S. W. 406; Needles's Ex'r. *v.* Needles, *supra.*

[10]Newsome *v.* Cogburn (1860) 30 Ga. 291; Brown *v.* Brown (1894) 139 Ind. 653. 39 N. E. 152; Bishop *v.* Davenport (1871) 58 Ill. 105; see 2 Story, Equity (13th ed.) § 1040*b*.

[11]See Bishop *v.* Davenport, *supra,* 110.

[12]Professor Pomeroy thinks the implication of a contract unnecessary. He regards such an assignment or release as an equitable assignment of a present possibility, which changes, when the expectancy is realized, into an assignment of equitable ownership. See Pomeroy, Eq. Jur. (3rd ed.) § 1288.

[13]Kershaw *v.* Kershaw (1882) 102 Ill. 307; Gore *v.* Howard (1895) 94 Tenn. 577, 30 S. W. 730; Coffman *v.* Coffman (1895) 41 W. Va. 8, 23 S. E. 523.

[14]Havens *v.* Thompson, *supra*; Gore *v.* Howard, *supra.*

In some states, the assignment of expectancies by prospective heirs is controlled by statute. The California Civil Code provides that an assignment or attempted transfer of such an interest is void.[15] But the courts have interpreted this provision as meaning that the assignment is void only at law, and they have enforced it in equity.[16] By the Civil Code of Louisiana, "the acceptance or renunciation of a succession before the succession is opened or left, is absolutely null and void and can produce no effect."[17] The Louisiana courts apparently give this statute a literal interpretation.[18]

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[15]Cal. Civ. Code, § 700, § 1045.

[16]Bridge *v.* Kedon (1912) 163 Cal. 493, 126 Pac. 149.

[17]La. Rev. Civ. Code, Art. 984.

[18]See Jacob's Succession (1901) 104 La. 447, 29 So. 241.

RECENT DECISIONS.

DENTON D. ROBINSON, *Editor-in-Charge.*

ALIENS—DEPORTATION OF CHINESE—POWER OF SECRETARY OF LABOR.—The applicant for a writ of habeas corpus was held under a warrant issued by the Secretary of Labor, charged with having been found in the United States in violation of the Chinese Exclusion Laws. The Immigration Department now threatens to bring the relator to a hearing before an Immigration Commissioner to determine whether he is subject to deportation. *Held,* the judicial department alone has authority to order the deportation of this alien. Applicant discharged. *Ex parte Woo Jan* (D. C. E. D. Ky. 1916) 228 Fed. 927.

Under the Chinese Exclusion Laws, Act Sept. 13, 1888, c. 1015, 25 Stat. 476, 479, aliens found in the United States in violation thereof are entitled to a judicial hearing for the determination of the question whether they are deportable according to the provisions of the act, while under the Immigration Act Feb. 20, 1907, c. 1134, 34 Stat. 898, the Secretary of Labor, through the Immigration Department, possesses the power of deporting after a hearing before an official of that Department. § 21 of the Immigration Act provides such a hearing for aliens subject to deportation under the provisions "of any law of the United States", and for their subsequent deportation in accordance with its provisions if the charge against them is sustained. § 43 enacts that the act "shall not be construed to repeal, alter or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent". Nevertheless, the opinion of the federal judiciary has almost unanimously been that an alien in the United States in violation of the Chinese Exclusion Acts may be deported through proceedings under § 21 of the Immigration Act. *Ex parte Woo Shing* (D. C. 1915) 226 Fed. 141; *Sibray* v. *United States ex rel. Yee Yok Yee* (C. C. A. 1915) 227 Fed. 1; *Ex parte Chun Woi San* (D. C. 1914) 230 Fed. 538; see *Ex parte Lam Pui* (D. C. 1914) 217 Fed. 456; *Ex parte Wong Yee Toon* (D. C. 1915) 227 Fed. 247; *cf. Wallis* v. *United States ex rel. Ng Sam* (C. C. A. 1916) 230 Fed. 71. These courts felt themselves bound by the decision of the Supreme Court in *United States* v. *Wong You* (1912) 223 U. S. 67, 32 Sup. Ct. 195, but that case only decided that, as noted in the principal case, Chinamen who had entered the United States in violation of the Immigration Act could be deported under its provisions. The case cannot be cited to uphold the decision in cases where there has been a deportation under the Immigration Act for a violation of the Chinese Exclusion Act, although the reasoning of the court goes far to support such a holding. If such a reading is given, however, the provision that the Exclusion Acts are not altered, amended or repealed by it, is ignored, since transferring the power to order deportation from the judicial to the legislative arm of the government is a substantial departure from the provision of the Exclusion Act. *Ex parte Wong Tuey Hing* (D. C. 1914) 213 Fed. 112, overruled by *Ex parte Chun Woi San, supra.*

BANKRUPTCY AS AN ANTICIPATORY BREACH OF CONTRACT.—The trustee of an involuntary bankrupt transfer company refused to complete an executory contract with a hotel to care for the latter's baggage and

livery business. In a suit by the hotel company, it was *held* that proceedings, whether voluntary or involuntary, resulting in an adjudication in bankruptcy, are the equivalent of an anticipatory breach of an executory agreement so as to entitle the hotel company to prove its claim against the bankrupt estate. *Central Trust Co.* v. *Chicago Auditorium Ass'n.* (1916) 36 Sup. Ct. 412.

There has been a considerable diversity in the decisions of the state and federal courts on this important question, as has been noted and discussed in 8 Columbia Law Rev. 305 and 13 Columbia Law Rev. 172. This is the first time the question has come before the Supreme Court, and while this case settles the law on the subject, it by no means remedies the deficiencies which are inherent in the Bankruptcy Act of 1898. The doctrine of anticipatory breach is inadequate to remove these deficiencies because of its narrow application, and because it still leaves the obligee an option to prove with the other creditors, or wait until the performance day of the contract arrives and then call upon the bankrupt to perform his agreement, to which action a discharge in bankruptcy would be no defense. See 8 Columbia Law Rev. 305 and 10 Columbia Law Rev. 709.

Banks and Banking—Misappropriation of Trust Funds—Liability of Bank.—An executor deposited to his personal account in the defendant bank checks drawn by him upon the estate's deposit in another bank. Some of the money so deposited was used to discharge his personal obligations to the defendant bank, and part to discharge personal obligations to other parties. In a suit on behalf of the beneficiary, *held,* the defendant is not liable for misappropriations made prior to such payment by the executor of his individual debt. Such payment, however, was sufficient to put the defendant on notice, and hence it is liable to the estate for all subsequent misappropriations. *Bischoff* v. *Yorkville Bank* (Ct. of App., N. Y., 1916) 55 N. Y. L. J. 619.

This decision, proceeding along the lines suggested in 10 Columbia Law Rev. 162, 11 *id.* 428, 13 *id.* 727, and 16 *id.* 341, soundly settles a doubtful question of New York law. The court refuses to burden the bank with liability unless the circumstances are such as to clearly put it on inquiry concerning the actions of the fiduciary.

Banks and Banking—Unclaimed Deposits—Constitutional Law.—A State statute required a bank to transfer to the state treasurer unclaimed deposits. The defendant bank contended that since the statute did not provide for such notice to the depositors and to the bank as would constitute due process of law, it deprived the bank of a property right without due process, rendered the institution liable to the depositors, and hence was unconstitutional. *Held,* the statute was constitutional and the deposit should be transferred. *State* v. *Security Savings Bank* (Cal. App. 1915) 154 Pac. 1070.

The right to regulate concerning the property of an absentee is an attribute which belongs to the government, *Cunnius* v. *Reading School District* (1905) 198 U. S. 458, 25 Sup. Ct. 721, and it is within the power of the state to legislate as to such property in the custody of a bank, *Provident Inst. for Savings* v. *Malone* (1911) 221 U. S. 660, 31 Sup. Ct. 661, particularly since banks are under the control and regulation of the state. See Magee, Banks and Banking (2nd ed.) 2. The bank cannot object that its property right is invaded because in the contract between the bank and the depositor there is an implied

condition that the deposit is subject to termination by the state when circumstances justify the state taking the deposit into its care. *Attorney General* v. *Provident Inst. for Savings* (1909) 201 Mass. 23, 86 N. E. 912. The depositor loses no rights because the state holds the fund as trustee for him. See *Attorney General* v. *Provident Inst. for Savings, supra.* In the principal case the bank is protected by statute from any action by the depositor, and since the transfer of the deposit to the state does not amount to an escheat, the statute requiring the transfer of unclaimed deposits is not rendered unconstitutional because it does not provide for notice.

CHAMPERTY—CONTRACT VOID—RECOVERY BY ATTORNEY IN QUANTUM MERUIT.—The plaintiff, an attorney, made a contract with the defendant, his client, by which the right to compromise the client's suit was restrained. *Held,* he may recover in *quantum meruit,* as the services in themselves are not illegal. *City of Rochester* v. *Campbell* (Ind. 1916) 111 N. E. 420.

Any contract between an attorney and his client by which the right of the client to compromise the suit is restrained, is invalid, *Davis* v. *Webber* (1899) 66 Ark. 190, 49 S. W. 822, nor is such a clause separable from any valid part of the contract. *Davis* v. *Webber, supra; contra, Granat* v. *Kruse* (1904) 114 Ill. App. 488. However, where the services rendered are not of themselves illegal and the champertous contract need not be relied on, a recovery in *quantum meruit* is usually allowed. *Davis* v. *Webber, supra; Stearns* v. *Felker* (1871) 28 Wis. 594. The courts which take the opposite view consider such a recovery against public policy, as an inducement to champerty. *Roller* v. *Murray* (1911) 112 Va. 780, 72 S. E. 665. Where the services rendered are in themselves illegal, as those under a contract to procure a divorce, no implied contract to pay will be raised. *Barngrover* v. *Pettigrew* (1905) 128 Iowa 533, 104 N. W. 904. Where the contract between attorney and client provides that the attorney is to pay the expenses of the litigation in turn for compensation by a contingent fee, the contract has been considered not only void, but illegal, and recovery denied. *Moreland* v. *Devenney* (1905) 72 Kan. 471, 83 Pac. 1097; *cf. Gammons* v. *Gulbranson* (1899) 78 Minn. 21, 80 N. W. 779. The champertous contract may be introduced in evidence in the suit in *quantum meruit* as evidence of what the parties themselves thought the services worth. *Davis* v. *Webber, supra; contra, Holloway* v. *Lowe* (1840) 1 Ala. 246.

CITIZENSHIP—EXPATRIATION.—The relator, a native of Sweden, naturalized in the United States, returned to Sweden and lived there for more than two years. *Held,* in the absence of proof to the contrary, he is to be considered as expatriated and an alien, under the Act of March 2, 1907, 34 Stat. 1228, § 2. *United States ex rel. Anderson* v. *Howe* (D. C., S. D. N. Y. 1916) 55 N. Y. L. J. 89. See Notes, p. 502.

COMMON LAW—ADOPTION—JUDGMENTS AGAINST JOINT TORT-FEASORS.—Appellant had recovered judgment against one joint tort-feasor, but execution was returned unsatisfied. In an action against other joint tort-feasors, the defendants demurred on the ground that such judgment operated as a bar. The common law of England prior to the 4th year of the reign of James I had been adopted by statute, and

the rule is well settled in that country since 1606 that a judgment against one joint tort-feasor bars an action for the same cause against another. But the court refused to follow this rule, and *held* that only full satisfaction would bar the plaintiff. *Ketelson* v. *Stilz* (Ind. 1916) 111 N. E. 423. See Notes, pp. 499, 510.

Corporations—Promissory Notes—Presumption of Authority of President to Execute.—The plaintiff, a purchaser for value without notice, sued the defendant, a real estate corporation, on two promissory notes executed in the name of the corporation by its president. *Held,* proof that the president executed the notes was *prima facie* evidence of his authority to bind the corporation in that manner. *Moyse Real Estate Co.* v. *First Nat. Bank of Commerce* (Miss. 1916) 70 So. 821.

Whether or not a presumption exists that a president of a corporation has authority to bind it by contracts executed by him in its behalf is essentially a question of agency. *Lloyd & Co.* v. *Matthews* (1906) 223 Ill. 477, 79 N. E. 172; *Ceeder* v. *Loud Lumber Co.* (1891) 86 Mich. 541, 49 N. W. 575. Accordingly, by the weight of authority, a contract made by the president for the corporation, in the usual course of business and within the corporate powers, and which the directors might have authorized him to make, is presumed to be binding on the corporation until lack of the president's authority is shown. *Patteson* v. *Ongley Elec. Co.* (1895) 87 Hun 462, 34 N. Y. Supp. 209, aff'd. 155 N. Y. 674, 49 N. E. 1101; *National State Bank* v. *Vigo Co. Nat. Bank* (1895) 141 Ind. 352, 40 N. E. 799; *Omaha Wool & Storage Co.* v. *Chicago etc. R. R.* (1914) 97 Neb. 50, 149 N. W. 55. In a few jurisdictions, however, the rule seems to be that where the authority of the president is challenged, this presumption does not exist. *Lyndon Mill Co.* v. *Lyndon Literary & Biblical Inst.* (1891) 63 Vt. 581, 22 Atl. 575. But, when the president performs an act not incidental or pertaining to the business of the corporation, nor engrafted thereon by a well established usage, his authority must be proved. *Cushman* v. *Cloverland Coal & Mining Co.* (1908) 170 Ind. 402, 84 N. E. 759; *Mathias* v. *White Sulphur Springs Assn.* (1897) 19 Mont. 359, 48 Pac. 624. Consequently, the president of a non-trading corporation is not presumed to have authority to bind the corporation by executing notes in its behalf, 13 Columbia Law Rev. 438; *St. Vincent College* v. *Hallett* (C. C. A. 1912) 201 Fed. 471; *People's Bank* v. *St. Anthony's etc. Church* (1888) 109 N. Y. 512, 521, 17 N. E. 408, and where the president of any corporation is named as payee in a note which he signs in his official capacity, such instrument puts a holder on notice as to the president's authority. *Capital City Brick Co.* v. *Jackson* (1907) 2 Ga. App. 771, 59 S. E. 92; *Porter* v. *Winona & Dakota Grain Co.* (1899) 78 Minn. 210, 80 N. W. 965. Still, a president of a trading corporation, being its chief administrative officer, is ordinarily presumed to have authority to execute promissory notes in the name of the corporation. *Dexter Savings Bank* v. *Friend* (C. C. 1898) 90 Fed. 703; *Lloyd & Co.* v. *Matthews, supra; cf. Chestnut St. Trust etc. Co.* v. *Record Pub. Co.* (1910) 227 Pa. 235, 75 Atl. 1067; *contra, City Elec. St. Ry.* v. *First Nat. Exchange Bank* (1896) 62 Ark. 33, 34 S. W. 89.

Criminal Law—Crime Committed Partly Within and Partly Without State—Statute—Construction.—Defendant was charged with larceny by false pretences. It appeared that the false pretences were

made in New York and the money obtained in Pennsylvania. *Held,* under § 1930 of the Penal Law (Consol. Laws c. 40), providing that a person who commits within the state any crime, in whole or in part, is liable to punishment within the state, the defendant is guilty if the transaction constituted a crime under the law of New York, regardless of the law in the state where it was consummated. *People* v. *Zayas* (N. Y. 1916) 111 N. E. 465.

Undoubtedly the general rule is that the laws of the state do not extend beyond its own territories, *The Apollon* (1824) 9 Wheat. 362, 370, and in the absence of a statute, the prevailing view is that the crime of obtaining money by false pretences is punishable only in the jurisdiction where the money is obtained. *Connor* v. *State* (1892) 29 Fla. 455, 10 So. 891; *Bates* v. *State* (1905) 124 Wis. 612, 103 N. W. 251. Usually, however, state statutes punishing any crime committed in part within the state have been upheld. *Richburger* v. *State* (1907) 90 Miss. 806, 44 So. 772; *People* v. *Botkin* (1908) 9 Cal. App. 244, 98 Pac. 861; *People* v. *Arnstein* (1914) 211 N. Y. 585, 105 N. E. 814. In construing somewhat similar statutes punishing as larceny the bringing into the state of goods stolen in another state, the question whether the original taking constituted larceny is to be determined by the laws of the state passing the statute and not by the laws of the place where the property was first taken. *Barclay* v. *U. S.* (1902) 11 Okla. 503, 69 Pac. 798; *State* v. *White* (1907) 76 Kan. 654, 92 Pac. 829; *contra, Territory* v. *Hefley* (1893) 4 Ariz. 74, 33 Pac. 618. It seems that the same rule was properly applied in the principal case. The object of the statute was to extend the scope of the laws of New York within the state. In enforcing those laws, it is unnecessary to inquire whether the completed act is a crime in the foreign state, for the laws of Pennsylvania have no bearing on the question of whether the laws of New York have been violated. The courts of no jurisdiction execute the penal laws of another. See *The Antelope* (1825) 10 Wheat. 66, 123; *Huntington* v. *Attrill* (1892) 146 U. S. 657, 666, 13 Sup. Ct. 224, 227.

Damages—Slander—Unauthorized Repetition by Third Persons.—In an action for slander, where the words alleged to have been spoken by the defendant were actionable *per se,* the trial court refused to instruct the jury that the plaintiff was entitled to recover only for the damage resulting directly from the utterance by the defendant. The defendant appealed. *Held,* since repetition is the natural and probable result of the original slander, the plaintiff may recover damages resulting therefrom. *Southwestern Tel. & Tel. Co.* v. *Long* (Tex. Civ. App. 1916) 183 S. W. 421. See Notes, p. 505.

Descent and Distribution—Release of Expectancy by Heir.—The plaintiff, in consideration of a conveyance to him of certain property by his father, executed a release of all rights in the latter's estate. The father died intestate. The plaintiff then claimed his distributive share in the estate, less the amount advanced to him. *Held,* the release was binding, and barred him from inheriting anything. *Boyer* v *Boyer* (Ind. App. 1916) 111 N. E. 952. See Notes, p. 512.

Equity—Jurisdiction—Removing Cloud on Title to a Chose in Action.—Complainant, by an assignment absolute on its face, transferred to his mother his interest in a life insurance policy made pay-

able to himself. After the death of his mother he brought a bill in equity to reform the assignment to conform to the alleged agreement that the policy should revert to him in case his mother died first. Certain distributees, residents of foreign states, were served by publication. On demurrer to the jurisdiction of the court over such non-residents, it was *held,* that the action was *quasi in rem* and that, since the court had before it the *res,* the claim against the insurance company, it could render a valid decree settling the rights of the parties under the policy. *Perry* v. *Young* (Tenn. 1916) 182 S. W. 577.

Assuming that the *situs* of the claim against the company was in any jurisdiction where it could be served with process through a duly accredited agent, see 16 Columbia Law Rev. 414, the court, under the statutes, could render a valid decree *in rem,* provided the nature of the claim presented a proper ground for invoking the jurisdiction of equity. The jurisdiction of equity to remove a cloud on title to realty is well recognized, and the maxim that equity acts *in personam* has no application where the power is conferred by statute. *Arndt* v. *Griggs* (1890) 134 U. S. 316, 10 Sup. Ct. 557; *Morris* v. *Graham* (C. C. 1892) 51 Fed. 53. Equity may, in a similar manner, take jurisdiction to remove a cloud on the title to a chose in action, *Ryan* v. *Seaboard etc. R. R.* (C. C. 1897) 83 Fed. 889; *Lockwood* v. *Brantly* (N. Y. 1883) 31 Hun 155, and it is no objection to an order for publication based on such a bill that the complaint asks more relief than can be obtained without personal service. *Chesley* v. *Morton* (1896) 9 App. Div. 461, 41 N. Y. Supp. 463. Such a proceeding is one *quasi in rem.* See *Sohege* v. *Singer Mfg. Co.* (1907) 73 N. J. Eq. 567, 68 Atl. 64. It is especially to be noted that the courts of at least one jurisdiction have been exceptionally liberal in granting relief to determine the rights of parties under an insurance policy because of its peculiar nature. See *Cohen* v. *New York etc. Ins. Co.* (1872) 50 N. Y. 610, 624; *Langan* v. *Supreme Council* (1903) 174 N. Y. 266, 66 N. E. 932; *Hadley* v. *Travelers Ins. Co.* (1910) 68 Misc. 359, 125 N. Y. Supp. 88. It has sometimes been said that the proper remedy for the insurance company where there are adverse claimants is by an action of interpleader, see *Bullowa* v. *Provident etc. Co.* (1908) 125 App. Div. 545, 109 N. Y. Supp. 1058; *Gleason* v. *Northwestern etc. Ins. Co.* (1911) 203 N. Y. 507, 97 N. E. 35, but in the principal case such remedy could not be available since the distributees of the assignee would not be entitled to recover upon the policy until the death of the complainant.

Evidence—Admission by Silence.—In an action against A and B for malpractice, the plaintiff attempted to introduce in evidence as an admission the following facts: in answer to a question asked by B, A's clerk C, who was not then in B's actual presence, made a statement, not called for by the question, which charged B with gross negligence. To this B made no reply. *Held,* B's silence did not constitute an admission. *State ex rel. Tiffany* v. *Ellison* (Mo. 1916) 182 S. W. 996.

Where statements are made in the presence of a party to the action, his silence operates as an admission of their truth only when they are made under such circumstances as would naturally call for an answer, and the person hearing them understands their meaning and is able to make a reply. *Commonwealth* v. *Kenney* (1847) 53 Mass. 235; *State* v. *Baruth* (1907) 47 Wash. 283, 91 Pac. 977; 2 Chamber-

layne, Evidence § 1423. But such evidence is always received with great caution, *Moore* v. *Smith* (Pa. 1826) 14 Serg. & R. 388, especially where the statements are made by strangers to the controversy, for such statements may be regarded as immaterial or impertinent. *Larry* v. *Sherburne* (1861) 84 Mass. 34; see *Briel* v. *Exchange Nat. Bank* (1911) 172 Ala. 475, 55 So. 808; but *cf. Boyles* v. *M'Cowen* (1810) 3 N. J. L. 677, 678. Silence is not an admission if the party refrains from speaking by advice of counsel, *People* v. *Conrow* (1911) 200 N. Y. 356, 93 N. E. 943, or if the statement is made to him merely for the purpose of drawing out his evidence, *Mattocks* v. *Lyman & Cole* (1844) 16 Vt. 113, for in the latter case silence may be the only wise and prudent course. *Boney* v. *Boney* (1913) 161 N. C. 614, 77 S. E. 784. Nor is the failure to reply to testimony at a trial an admission of its truth, as the party could not interrupt the proceedings, and even if called as a witness could not volunteer answers. *Horan* v. *Byrnes* (1903) 72 N. H. 93, 54 Atl. 945; *Leggett* v. *Schwab* (1906) 111 App. Div. 341, 97 N. Y. Supp. 805; *contra, Harlow* v. *Perry* (Me. 1916) 96 Atl. 775. To be admissible, the statement need not be spoken in the immediate presence of the party; it is sufficient if he is near by. *State* v. *Baruth, supra; Commonwealth* v. *Sliney* (1878) 126 Mass. 49. The principal case seems sound, since the statement was made by a stranger who was not then in the defendant's presence.

Evidence—Recital of Consideration in Deeds—Presumption.—Peggy Hudson conveyed land to Adams who in turn conveyed to the defendant. The heirs of Peggy Hudson seek to cancel her deed to Adams on account of the insanity of the grantor, and that from Adams to the defendant on the ground that the defendant was not a *bona fide* purchaser. *Held,* the recital in the second deed of the payment of consideration is no evidence against the plaintiff. *Adams Oil & Gas Co.* v. *Hudson* (Okla. 1915) 155 Pac. 220.

When the recital in a deed of payment of consideration is merely a receipt it raises a presumption against the parties to the deed, or those claiming through or under them, that the consideration has been paid, *Stauffer* v. *Martin* (1909) 43 Ind. App. 675, 88 N. E. 363; see *Sillyman* v. *King* (1873) 36 Iowa 207; *Lloyd* v. *Lynch* (1857) 28 Pa. 419, and such recital is conclusive to prevent the grantor from questioning the validity of the conveyance. See *Shehy* v. *Cunningham* (1909) 81 Oh. St. 289, 90 N. E. 805; Jones, Evidence (2nd ed.) § 470. When, however, third parties attack the deed, the more general view is that a recital in the nature of a receipt is inadmissible as evidence against a stranger to the deed, *Ely* v. *Pace* (1904) 139 Ala. 293, 35 So. 877; *Minneapolis & St. L. R. R.* v. *Chicago M. & St. P. R. R.* (1902) 116 Iowa 681, 88 N. W. 1082, even though he have the equitable title, *King* v. *Mead* (1899) 60 Kan. 539, 57 Pac. 113, though some courts have held that even against strangers a recital of payment is *prima facie* evidence of the fact of payment. *McConnell* v. *Citizens' State Bank* (1891) 130 Ind. 127, 27 N. E. 616; *Doody* v. *Hollwedel* (1897) 22 App. Div. 456, 48 N. Y. Supp. 93. But, as the reason a recital is *prima facie* evidence against the grantor and his heirs is that it is an admission made by the grantor, 2 Devlin, Deeds (3rd ed.) § 817, while as against a third party such recital would be a mere *ex parte* declaration, not under oath, and taken without opportunity of cross-examination, *Lloyd* v. *Lynch, supra,* those cases

excluding such recitals as evidence against strangers appear correct. Hence the principal case seems rightly decided.

EXTRADITION — INTERSTATE RENDITION — SURRENDER OF FUGITIVE TO A THIRD STATE.—The plaintiff had been extradited from Oregon to Texas, and was there tried and acquitted on a charge of murder. Instead of being then released, she was held pursuant to a requisition from the Governor of Georgia for delivery to that state as a fugitive from justice. She contended that she was entitled to release from custody, on the ground that the federal statute gave the Governor of Texas no authority to order her extradition, since she was never a fugitive from justice from Georgia to Texas, but had been brought there unwillingly under legal process. *Held,* by the omission to extend the federal rendition statute to the full limits of the constitutional power, it must have been intended to leave the circumstances unprovided for subject to the state authority, and hence, by the principles of comity, the plaintiff was not entitled to a release. *Innes* v. *Tobin* (1916) 36 Sup. Ct. 290.

Reasoning from the right of protection, or asylum, which a fugitive from justice has in international cases, as shown in *United States* v. *Rauscher* (1886) 119 U. S. 407, 7 Sup. Ct. 234, it has been maintained that where a defendant is brought into a state as a fugitive from justice and has served sentence or been acquitted, he cannot be surrendered to the authorities of another jurisdiction as a fugitive, but must be allowed an opportunity to return to the state from which he was extradited. *Matter of Hope* (1889) 7 N. Y. Cr. 406, 10 N. Y. Supp. 28; Spear, Extradition (2nd ed.) 558, 571; but *cf. Hackney* v. *Welsh* (1886) 107 Ind. 253, 8 N. E. 141. But the distinction between the principles of international extradition and interstate rendition should be kept clear, *Lascelles* v. *Georgia* (1893) 148 U. S. 537, 13 Sup. Ct. 687; *State* v. *Stewart* (1884) 60 Wis. 587, 19 N. W. 429, and it should be remembered that all of the United States have a common interest in the punishment of crime, and under the Constitution and federal law they have no power to grant an asylum to fugitives from other states after a proper requisition for their return has been made. *Mahon* v. *Justice* (1888) 127 U. S. 700, 715, 8 Sup. Ct. 1204; 6 Columbia Law Rev. 522. Hence it follows that, since the omission to extend the federal statute to the full limits of the constitutional power left the subject to the state authorities, and since a state has no right to accord asylum or dictate terms of surrender, according to the principles of interstate rendition founded on the Constitution and the Act of Congress, it cannot be contended that the accused, having been brought to the surrendering state against his will by legal process, must be allowed an opportunity to return to the state from which he was extradited, as the question of his surrender is, rather, to be determined in any state in which he may be "found". *People* v. *Sennott* (Cir. Ct., Cook Co., Ill. 1879) 20 Alb. L. J. 230; Church, *Habeas Corpus* § 472 C; 2 Moore, Extradition & Interstate Rendition §§ 645-648.

GARNISHMENT—COMMON CARRIERS—GOODS IN TRANSIT.—The plantiff seeks to hold a railroad company liable as garnishee for the value of goods shipped by the defendant, consigned to a point without the state, but actually in transit within the state, though in another

county, when notice of garnishment was served on the railroad's agent. *Held,* the carrier is not liable as garnishee. *Dart Mfg. Co.* v. *Carr* (Iowa 1916) 156 N. W. 714.

Though goods are subject to garnishment in the hands of a bailee, *Farmers & Mechanics' Bank* v. *Welles* (1877) 23 Minn. 475; *Elser* v. *Rommel* (1893) 98 Mich. 74, 56 N. W. 1107, even when the bailee is a common carrier holding them within the state as warehouseman whether before or after the actual carriage, *Cooley* v. *Minnesota Transfer Ry.* (1893) 53 Minn. 327, 55 N. W. 141; *Landa* v. *Holck & Co.* (1895) 129 Mo. 663, 31 S. W. 900; *Rosenbush* v. *Bernheimer* (1912) 211 Mass. 146, 97 N. E. 984, the authorities are substantially unanimous to the effect that goods in transit without the state are not to be garnished. *Montrose Pickle Co.* v. *Dodson & Hills Mfg. Co.* (1888) 76 Iowa 172, 40 N. W. 705; *Western R. R.* v. *Thornton & Acee* (1878) 60 Ga. 300; *Bates* v. *Chicago M. & St. P. Ry.* (1884) 60 Wis. 663, 19 N. W. 72. The principal case is supported by the great weight of authority in applying this rule to property in transit within the state. *Illinois Central R. R.* v. *Cobb* (1868) 48 Ill. 402; *Baldwin* v. *Great Northern Ry.* (1900) 81 Minn. 247, 83 N. W. 986; see *Bates* v. *Chicago M. & St. P. Ry., supra; contra, Adams* v. *Scott* (1870) 104 Mass. 164. It has been suggested that the carrier cannot legally be prevented from carrying out its contract and thus be subjected to liability to the consignee or assignee of the bill of lading, but it seems that it would be protected by a valid garnishment, *Adams* v. *Scott, supra,* and, moreover, this argument would be equally valid against permitting garnishment of goods in the carrier's hands as warehouseman before or after transit. Furthermore, since private carriers are not accorded a similar protection against garnishment, *Elser* v. *Rommel, supra,* it seems clear that the extent of the business ordinarily conducted by common carriers, involving great practical difficulties in stopping goods in transit, is the true and logical ground for the prevailing view. See *Bates* v. *Chicago M. & St. P. Ry., supra.*

Injunctions—Mandatory and Prohibitive—Effect of Appeal.—The plaintiff obtained in a former action an injunction *pendente lite* to restrain the city of San Francisco from running over tracks owned in common by the plantiff and the city more cars than their contract allowed. The defendant appealed from the decree and continued to use the tracks as it had been doing. The plaintiff sought an original writ of mandate to compel the Superior Court to cite and punish the mayor and other officials for their disobedience of the court's order. *Held,* one judge dissenting, the city officials were in contempt, since the injunction was prohibitory and therefore was not suspended by the appeal. *United Railroads of San Francisco* v. *Superior Court* (Cal. 1916) 155 Pac. 463. See Notes, p. 507.

Insurance—Marine—Restraint of Princes.—Two British vessels bound from South America to Germany were detained in British ports in consequence of the declaration of war and the proclamations prohibiting trade with the enemy. *Held,* there was a constructive total loss due to "restraints of kings, princes, and people" within the meaning of the policy. *Sanday & Co.* v. *British and Foreign Marine Ins. Ltd.* [1915] 2 K. B. 781, aff'd. H. L. (1916) 140 L. T. 283.

The restraint need not be by actual seizure nor by the direct application of physical force to the goods, *Rodoconachi* v. *Elliott* (1874)

L. R. 9 C. P. 518; *Olivera* v. *Union Ins. Co.* (1818) 16 U. S. 183; *cf. The Athanasios* (D. C. 1915) 228 Fed. 558, but it must be actual and not potential or probable; mere fear of seizure is not enough, *Kacianoff* v. *China Traders' Ins. Co.* [1914] 3 K. B. 1121; *King* v. *Delaware Ins. Co.* (C. C. 1808) 14 Fed. Cas. 516, aff'd. (1810) 10 U. S. 71, unless the peril be so imminent as to amount to actual restraint. *Cf. Nobel's Explosives Co.* v. *Jenkins & Co.* [1896] 2 Q. B. 326. Such restraint must be by the ruling power of the country and not by a mob of individuals, *Nesbitt* v. *Lushington* (K. B. 1792) 4 T. R. 783, but it does not include ordinary judicial process. Rule 10 of Rules for Construction of Policy in Schedule to Marine Ins. Act, Ch. 41 of Public General Stat. of 1906; *cf. Finlay* v. *Liverpool & Gt. Western S. S. Co.* (Exch. 1870) 23 L. T. [N. S.] 251; but *cf. Simpson* v. *Charleston Fire & Marine Ins. Co.* (S. C. 1838) Dud. 239. Yet it has been extended to an executive decree enforcing the sanitary regulations of a country, *Miller* v. *Law Accident Ins. Co.* [1903] 1 K. B. 712, and to a detention at quarantine. *The Progreso* (C. C. A. 1892) 50 Fed. 835. Hence it seems that the declaration of war and the proclamation prohibiting trade in the principal case were sufficiently distinct from the ordinary operation of the law to constitute a restraint within the meaning of the policy. Nor does it seem that the acts of the government of the insured are excepted, for a domestic embargo is included in the clause by the decisions in this country, *Odlin* v. *Insurance Co. of Pa.* (C. C. 1808) 18 Fed. Cas. 583; *M'Bride* v. *Marine Ins. Co.* (N. Y. 1810) 5 Johns. *299; *Lorent & Steinmitz* v. *S. C. Ins. Co.* (S. C. 1819) 1 Nott & McC. 505, and the rule in England seems to be the same. 1 Park, Marine Ins. (8th ed.) 175.

Insurance—Period of Limitation—Commencement of the Period.—A fire insurance policy stipulated that no action should be maintainable against the insurer unless commenced with twelve months next after the fire. Another clause provided that the policy should not become payable until sixty days after ascertainment and satisfactory proof of the loss to the company. In an action upon the policy, *held*, the period of limitation began to run from the date of the fire, not from the accrual of the cause of action. *Wever* v. *Pioneer Fire Ins. Co.* (Okla. 1915) 153 Pac. 1146.

It is generally recognized that the parties to an insurance contract may agree to waive the benefit of the Statute of Limitations and confine the time within which a suit upon the policy may be brought to a shorter period than that determined by the statute. *Tasker* v. *Kenton Ins. Co.* (1878) 58 N. H. 469; Richards, Insurance, § 326. When it is stipulated that the period shall commence with the date of the "loss", a number of courts, construing this provision together with the other terms of the policy, have interpreted the word "loss" to mean the accrual of the insured's cause of action against the company, thus avoiding the possibility that the period might elapse before the insured, under the terms of the policy, could bring suit. *Steen* v. *Niagara Fire Ins. Co.* (1882) 89 N. Y. 315; *Sun Ins. Co.* v. *Jones* (1891) 54 Ark. 376, 15 S. W. 1034; *German Fire Ins. Co.* v. *Fairbank* (1891) 32 Neb. 750, 49 N. W. 711; *contra, Rottier* v. *German Ins. Co.* (1901) 84 Minn. 116, 86 N. W. 888; *Virginia F. & M. Ins. Co.* v. *Wells* (1887) 83 Va. 736, 3 S. E. 349. Other courts, endeavoring to reach the same result, have sought to read a like meaning into policies wherein the event with

which the period was to commence was expressly specified. *Kiisel* v. *Mutual Reserve Ins. Co.* (1906) 131 Iowa 54, 107 N. W. 1027; *Case* v. *Sun Ins. Co.* (1890) 83 Cal. 473, 23 Pac. 534. The better reasoned decisions, however, refuse to change the insurance contract by disregarding the expressed intentions of the parties. *McElroy* v. *Continental Ins. Co.* (1892) 48 Kan. 200, 29 Pac. 478; *Maxwell Bros.* v. *Liverpool etc. Ins. Co.* (1912) 12 Ga. App. 127, 76 S. E. 1036; see *Virginia F. & M. Ins. Co.* v. *Wells, supra.* But it is firmly established that, where the insurer's bad faith prevents the accural of the right of action until after the period has elapsed, the limitation is waived, and the insurer is precluded from setting it up as a defence. *Thompson* v. *Phenix Ins. Co.* (1890) 136 U. S. 287, 297, 10 Sup. Ct. 1019, 1023; *Goodwin* v. *Merchants' etc. Ins. Co.* (1902) 118 Iowa 601, 92 N. W. 894; *Home Ins. Co.* v. *Myer* (1879) 93 Ill. 271.

Interned Alien Enemy—Right to Sue in Courts of Belligerent.—In a suit for an injunction against breach of contract, the defendant pleaded that the plaintiff was an interned German civilian, and hence was debarred from recourse to the courts. *Held,* internment does not deprive the plaintiff of his right to resort to the courts. *Schaffenius* v. *Goldberg* (Ct. of App. 1915) 140 L. T. 88.

The early common law, while it permitted an alien friend to maintain personal actions, denied to an alien enemy the right to bring any action whatever until peace was declared. Co. Litt. 129 b; Bac. Abr. Tit. Aliens D. But the plea of alien enemy came to be strongly condemned by the courts, see *Sparenburgh* v. *Bannatyne* (1797) 1 Bos. & Pul. 163, and the right of an alien enemy dwelling under license within the belligerent country to resort to its courts was recognized; *Wells* v. *Williams* (1698) 1 Raym. 282; *Topay* v. *Crow's Nest etc. Co.* (1914) 20 Br. Col. 235; *Clarke* v. *Morey* (1813) 10 Johns. 69; *cf. Viola* v. *Mackenzie, Mann & Co.* (1915) 24 D. L. R. 208; but *cf. Russel* v. *Skipwith* (Pa. 1814) 6 Binn. 241; while it was denied, for reasons of policy, to an alien enemy residing in his native country. *Brandon* v. *Nesbitt* (1794) 6 T. R. 23; see *Wells* v. *Williams, supra*; *Clarke* v. *Morey, supra.* A prisoner of war cannot sue a writ of habeas corpus, *Rex* v. *Schiever* (1759) 2 Burr. 765; *Furly* v. *Newnham* (1780) 2 Doug. *419, and the Aliens Restriction Order (1914) 111 L. T. R., Statutes, 12 *et seq.,* requiring the interment of aliens of enemy nationality, so far makes those interned prisoners of war that they cannot sue out a writ of habeas corpus. *Rex* v. *Superintendent etc.* [1915] 3 K. B. 716; *Ex parte Weber* [1916] 1 K. B. 280, aff'd. (H. L. 1916) 32 T. L. R. 312. But with this exception, since in effect the interment is a license or rather a command that the alien enemy remain within the country, the persons so permitted to remain should be accorded the same rights to use the courts as other aliens. *Princess Thurn and Taxis* v. *Moffitt* [1915] 1 Chanc. 58; Hall, International Law (6th ed.) 388. No rule of public policy requires that the plaintiff in such a situation as in the principal case, should be put to the disadvantage of having his rights suspended during the continuance of the war; and the conclusion of the court rests on sound principle and justice.

Marriage Annulment—Impotency.—The husband sued for an annulment of the marriage on the ground of the impotency of his wife. *Held,* if a slight operation will remove the incapacity without endangering life and health, the fact that the incapable one refuses to submit

to such treatment does not justify an annulment, since such incapacity is not incurable within the meaning of the law. *Anonymous* (N. Y. Sup. Ct., Spec. Term, 1916) 54 N. Y. L. J. 2414.

In England under the canon law, impotency existing at the time of the marriage was cause for a divorce or marriage annulment, see *G.* v. *G.* (1870) 33 Md. 401, 407, but as this ground was cognizable only by the ecclesiastical courts and such tribunals do not exist in the United States, it is held that in the absence of statutes on the subject our courts have no jurisdiction to annul a marriage for such cause. *Anonymous* (1873) 24 N. J. Eq. 19; 1 Bishop, Marriage and Divorce, (6th ed.) § 72. These statutes have been generally enacted in the various states. *Bunger* v. *Bunger* (1911) 85 Kan. 564, 117 Pac. 1017; *Payne* v. *Payne* (1891) 46 Minn. 467, 49 N. W. 230. "Impotency", such as to justify annulment of the marriage, means an incapacity for *copula vera,* as distinguished from incomplete copulation or lack of power of procreation. *Jorden* v. *Jorden* (1900) 93 Ill. App. 633; *Anonymous* (1889) 89 Ala. 291, 7 So. 100; *D*—— v. *A*—— (1845) 1 Rob. Ecc. 279. This condition must have existed at the time of the marriage and be permanent and incurable, *Bascomb* v. *Bascomb* (1852) 25 N. H. 267; *Kempf* v. *Kempf* (1863) 34 Mo. 211, so that a slight operation not injurious to life or health would not remove the difficulty, *Devanbagh* v. *Devanbagh* (N. Y. 1836) 6 Paige 175; see *Bascomb* v. *Bascomb, supra.* The fact that the defendant will not submit to this operation does not warrant a divorce in New York, *Devanbagh* v. *Devanbagh, supra*; but this is not the universal rule, *L.* v. *W.* (1882) 51 L. J. P. D. & Adm. 23; *cf. Griffeth* v. *Griffeth* (1896) 162 Ill. 368, 44 N. E. 820; but *cf. S.* v. *E.* (1863) 3 Swab. & Tr. 240. In the absence of other evidence the English courts have applied the triennial test of the canon law and granted a decree of nullity where there has been cohabitation for three years without consummation—thus, where after that length of time the wife appears to be *virgo intacta et apta viro,* the husband's impotency will be presumed. *Sparrow* v. *Harrison* (1841) 3 Curt. Ecc. 16; see *F.* v. *D.* (1865) 4 Swab. & Tr. 86.

Mortgages—Grantee of Mortgaged Land—Liability to Mortgagee.—A mortgagor conveyed the mortgaged premises to a purchaser subject to the mortgage, the amount thereof being deducted from the price. In a foreclosure suit the purchaser attempted to contest the validity of the mortgage as to his grantor. *Held,* he was precluded from contesting the mortgage. *United States Bond & Mortgage Co.* v. *Keahey* (Okla. 1916) 155 Pac. 557.

The grantee of mortgaged premises who has assumed the payment of the mortgage may avoid his personal liability for a deficiency on a foreclosure sale by showing the non-liability of his grantor only in a jurisdiction where the mortgagee sues on the equitable subrogation theory. *Norwood* v. *De Hart* (1879) 30 N. J. Eq. 412; *Vrooman* v. *Turner* (1877) 69 N. Y. 280; 16 Columbia Law Rev. 352. If he has not assumed the mortgage but has taken subject to it, the amount thereof being deducted from the purchase price, it is generally held, as in the principal case, that he may not contest the validity of the mortgage on foreclosure even where the subrogation theory obtains. *McConihe* v. *Fales* (1887) 107 N. Y. 404, 14 N. E. 285. *A fortiori,* he cannot do so in a state where the mortgagee sues as the beneficiary of the contract between the grantee and grantor. The grantee, therefore, may not prove usury, see *Trusdell* v. *Dowden* (1890) 47 N. J. Eq. 396, 20 Atl. 972, or that the land was homestead, *Batts* v. *Banking Co.*

(1901) 26 Tex. Civ. App. 515, 63 S. W. 1046, or that a statute prohibited a mortgage at that time. *Jones* v. *Perkins* (1914) 43 Okla. 734, 144 Pac. 183. It is argued that there is no inequity in holding the grantee to his contract, whereas to release him would be a fraud on the mortgagee and grantor. *Fuller & Co.* v. *Hunt* (1878) 48 Iowa 163. Of course if the grantor is liable independently of the mortgage, the grantee must indemnify him, see *Selby* v. *Sanford* (1898) 7 Kan. App. 781, 54 Pac. 17, but if the grantor has a defense there seems to be no reason for allowing the mortgagee to recover a debt which his own misconduct may have barred as against the mortgagor. A few jurisdictions hold that a grantee, taking a deed which recites the mortgage, is estopped thereby. *Foy* v. *Armstrong* (1901) 113 Iowa 629, 85 N. W. 753; *Johnson* v. *Thompson* (1880) 129 Mass. 398. A more satisfactory theory is that the grantor has in effect given the grantee the cash to pay the debt, and the latter is a mere messenger to deliver it to the mortgagee. *Hiner* v. *Whitlow* (1899) 66 Ark. 121, 49 S. W. 353.

Patents—Infringement—Costs in Master's Proceedings.—After the jury had found that the plaintiff's patent had been infringed, references were ordered to a special master to take and state an account of profits and damages. On application by the master for an order specifying which party should pay in the first instance for the proceedings before him, *held,* each party should pay the costs and expenses made by himself, leaving the question of their ultimate payment to be determined when the final decree is entered. *Panoulias* v. *National Equipment Co.* (D. C., S. D., N. Y. 1915) 227 Fed. 1008.

Though courts have infrequently passed on the subject, still there are, as pointed out in the principal case, three views as to which party should, in the first instance, bear the costs of expenses incurred before a master. One view is that the burden should be on the complainant; *Macdonald* v. *Shepard* (C. C. 1882) 10 Fed. 919; another, that where the defendant has been adjudged an infringer, he should pay such costs; *Urner* v. *Kayton* (C. C. 1883) 17 Fed. 539; while the third is that each party should pay his own costs. *U. S. Printing Co.* v. *American Playing-Card Co.* (C. C. 1897) 81 Fed. 506; *cf. Brickill* v. *Mayor etc., of New York* (C. C. 1893) 55 Fed. 565. Of these three rules the last seems preferable, as it tends toward prompting the parties to confine their expenses to those which are reasonably necessary, and as it does not saddle an unwarranted burden on either party before the termination of the action. See *U. S. Printing Co.* v. *American Playing-Card Co., supra.*

Pleading and Practice—Negativing Exceptions.—Rev. Stat. 1909, § 8315, declares that any person practicing medicine or surgery without license from the state board of health, shall be guilty of a misdemeanor, provided that physicians registered on or prior to March 12, 1901, shall be regarded for every purpose as licentiates and registered physicians under the provisions of this article. *Held,* that it was not necessary to negative the exception in the information. *State* v. *Saak* (Mo. App. 1916) 182 S. W. 1074.

Where an exception or proviso in a statute is part of the description of the offense, or a qualification of the language defining or creating it, the exception must be negatived in the indictment or information, *State* v. *Connor* (1906) 142 N. C. 701, 55 S. E. 787; *Binhoff* v. *State* (1907) 49 Ore. 415, 90 Pac. 586, but where the exception merely ex-

empts certain persons or acts from the operation of the statute, it need not be negatived in the pleading, as it is matter of defense. *State* v. *Gallagher* (1897) 20 R. I. 266, 38 Atl. 655; *Hale* v. *State* (1898) 58 Ohio St. 676, 51 N. E. 154; *Blocker* v. *State* (1912) 12 Ga. App. 81, 76 S. E. 784. It is sometimes stated that the indictment must negative exceptions in the enacting clause but not those in other clauses, *Commonwealth* v. *Maxwell* (1824) 19 Mass. 139; *Byrd* v. *State* (1910) 59 Tex. Cr. 513, 516, 129 S. W. 620, 622, but this is hardly a precise statement of the rule, for it is the nature of the exception and not its location which is decisive. Not every exception in the section containing the enacting clause need necessarily be negatived in the pleading. The real question is whether the exception or proviso is so incorporated with the enactment as to constitute a material part of the definition or description of the offense. *State* v. *Abbey* (1856) 29 Vt. 60; *United States* v. *Cook* (1872) 84 U. S. 168. If the offense is clearly defined without reference to the exception, the pleader need not refer to it, even though it be in the same section with the enacting clause. *Ex parte Hornef* (1908) 154 Cal. 355, 97 Pac. 891; *State* v. *Moore* (1914) 166 N. C. 284, 81 S. E. 294. While it is a close question in the principal case, it seems that the court was right in regarding the proviso as a mere exemption of a certain class from the operation of the statute.

Pleading and Practice—Special Appearance—Waiver of Objections by Subsequent General Appearance.—The defendant appeared specially and filed a plea attacking the jurisdiction of the court over his person. The plea was overruled, and an exception taken. Following a subsequent motion to make the complaint more definite, the defendant pleaded to the merits, reserving its objection to the jurisdiction. *Held,* the defendant had not waived the objection. *Commonwealth Cotton Oil Co.* v. *Hudson* (Okla. 1916) 155 Pac. 577.

Where the defendant appears specially to object to the jurisdiction of the court over his person, and his objection made at such time is overruled, it has been held in some states that a subsequent general appearance waives the objection. *Franklin Life Insurance Co.* v. *Hickson* (1902) 197 Ill. 117, 64 N. E. 248; *Henry* v. *Spitler* (1914) 67 Fla. 146, 64 So. 745; *cf.* 6 Columbia Law Rev. 60. But the better reasoned line of decisions, of which the principal case is typical, holds that, if the defendant excepts to the adverse ruling on the question of jurisdiction, his subsequent pleading to the merits does not operate as a waiver, since, under the circumstances, it is scarcely voluntary on his part. *Harkness* v. *Hyde* (1878) 98 U. S. 476; *Fisher* v. *Crowley* (1905) 57 W. Va. 312, 50 S. E. 422; *State ex rel. Lane* v. *District Court* (Mont. 1915) 154 Pac. 200; see 12 Columbia Law Rev. 281. The objection must be preserved, however, in all subsequent pleadings, *Chicago, R. I. & P. Ry.* v. *Jaber* (1908) 85 Ark. 232, 107 S. W. 1170, and the defendant will be deemed to have waived it if he enters a general appearance before a decision has been rendered on the question raised by his special appearance, *Perkins* v. *Hayward* (1892) 132 Ind. 95, 31 N. E. 670; *Barnes* v. *Western Union Tel. Co.* (C. C. 1903) 120 Fed. 550; but *cf. Wheeler* v. *Wilkins* (1869) 19 Mich. 78, or asks for affirmative relief, since he thereby invokes the jurisdiction of the court. *Lower* v. *Wilson* (1896) 9 S. D. 252, 68 N. W. 545; *Chandler* v. *Citizens National Bank* (1898) 149 Ind. 601, 49 N. E. 579. But since a motion to make more definite is clearly not a request for affirmative relief, the court in the principal case correctly held that the defendant had not waived his objection to the jurisdiction.

RIGHT OF PRIVACY—CO-PARTNERSHIP—SECTION 51 OF NEW YORK CIVIL RIGHTS LAW.—In an action for the unauthorized use of the name of a co-partnership, under § 51 of the Civil Rights Law, providing that "Any person whose name, portrait or picture is used within this state for advertising purposes or for purposes of trade without written consent . . . many maintain an equitable action . . . against the person, firm or corporation so using his name", *held*, that the name of a co-partnership is not within the purview of this section. *Rosenwasser* v. *Ogoglia* (App. Div., 2nd Dept., 1916) 158 N. Y. Supp. 56.

The New York courts have construed this statute rather strictly, for it is, in part at least, penal (see § 50), and should be interpreted accordingly. *Jeffries* v. *New York Evening Journal Pub. Co.* (1910) 67 Misc. 570, 124 N. Y. Supp. 780; *Merle* v. *Sociological Research Film Corp.* (1915) 166 App. Div. 376, 152 N. Y. Supp. 829; see *Binns* v. *Vitagraph Co.* (1913) 210 N. Y. 51, 103 N. E. 1108. Thus they have held that the use must be continuous and one that is clearly for advertising or trade purposes, as it was such evils that the statute was intended to prevent. *Moser* v. *Press Pub. Co.* (1908) 59 Misc. 78, 109 N. Y. Supp. 963; *Colyer* v. *Fox Pub. Co.* (1914) 162 App. Div. 297, 146 N. Y. Supp. 999; *Merle* v. *Sociological Research Film Corp., supra.* A co-partnership is not included in the definition of the term "person" in § 37 of the General Construction Law, and as it is not a person, *Matter of Peck* (1912) 206 N. Y. 55, 60, 99 N. E. 258, 259; Burdick, Partnership (2nd ed.) 81, it has no rights under this statute, for the act created a personal right. See *Ellis* v. *Hurst* (1910) 66 Misc. 235, 121 N. Y. Supp. 438. Nor does this case seem to come within the general purview of the act, for the statute was directed at practices such as those revealed in *Robertson* v. *Rochester Folding Box Co.* (1902) 171 N. Y. 538, 64 N. E. 442, the refusal of equitable relief in that case leading to the passage of the act. The most prominent element in such cases, the injury to the sensibilities of the individual from the intrusion upon his privacy, is entirely lacking in the case of a co-partnership.

STATUTE OF FRAUDS—SALE OF GOODS—AGREEMENT TO BUY AND DIVIDE.—Plaintiff and defendant entered into an oral contract to purchase jointly a stock of goods at an insolvency sale. Half of the purchase price was to be paid by each party; the proceeds of any resales were to be equally shared, and the remaining goods were to be divided at an inventory valuation. Defendant bid in the goods at the sale and, in repudiation of the contract, retained them all. *Held*, this agreement was not within the Statute of Frauds. *Stack* v. *Roth Bros. Co.* (Wis. 1916) 156 N. W. 348.

An oral contract between two or more parties to undertake the purchase of goods for division between themselves or for resale to other parties is not within the Statute of Frauds, *Hunt* v. *Elliott* (1881) 80 Ind. 245; *Reaves* v. *Roff* (1809) 3 N. J. L. 609; *cf. Mason* v. *Spiller* (1904) 186 Mass. 346, 71 N. E. 779, unless the contract also involves a sale between the parties themselves. *Brown* v. *Slauson* (1868) 23 Wis. 244. In such circumstances as occur in the principal case, equity will raise a constructive trust for the benefit of the injured party which may be established by parol evidence. 1 Perry, Trusts § 166; Brown, Statute of Frauds, § 96a; *Strong* v. *Glasgow* (1813) 6 N. C. 289. The contract between the parties not being within the Statute of Frauds, it would seem that this statute should not hinder a recovery, either in law upon the contract, or in equity on the theory

of a constructive trust, against the corporation which acquired and retained the legal title to the stock of goods to the exclusion of the plaintiff. *King* v. *Barnes* (1888) 109 N. Y. 267, 16 N. E. 332.

TAXATION—CONSTITUTIONAL LAW—INCOME TAX.—In a suit to enjoin compliance with the income tax provisions of the tariff act of 1913, *held,* the act is authorized by the Sixteenth Amendment and is not wanting in due process. *Brushaber* v. *Union Pacific R. R.* (1916) 240 U. S. 1, 36 Sup. Ct. 236.

Notwithstanding numerous dicta that direct taxes included only capitation and land taxes, see *Hylton* v. *United States* (1796) 3 U. S. *171; *Pacific Insurance Co.* v. *Soule* (1868) 74 U. S. 433; *Veazie Bank* v. *Fenno* (1869) 75 U. S. 533, and despite express holdings that an income tax was not a direct tax, *Springer* v. *United States* (1880) 102 U. S. 586; *Smedberg* v. *Bentley* (C. C. 1874) 21 Int. Rev. Rec. 38, 22 Fed. Cas. 368; see *Scholey* v. *Rew* (1874) 90 U. S. 331; *cf. Waring* v. *The Mayor, etc. of Savannah* (1878) 60 Ga. 93, it was finally decided that a tax on the income derived from real and personal property, being in effect a tax upon the property itself because of its ownership, was a direct tax and must be apportioned. *Pollock* v. *Farmers' Loan and Trust Co.* (1895) 157 U. S. 429, 15 Sup. Ct. 673; 158 U. S. 601, 15 Sup. Ct. 912. By the Sixteenth Amendment, however, Congress is now authorized to levy a tax on incomes, "from whatever source derived", without apportionment. See 10 Columbia Law Rev. 379. In the principal case, this amendment is held to be consistent with the clause requiring apportionment of direct taxes, and is construed to prevent a resort to the sources of an income to take the tax thereon out of the class of indirect taxes, and place it in that of direct. Apparently, however, under this interpretation the amendment does not foreclose the possibility that by some other criterion, as yet undiscovered, an income tax may still be construed as direct and requiring apportionment. The income tax law in question, moreover, is not unconstitutional as a violation of the due process clause, since the taxing power of Congress is restricted only by the express limitation of the Constitution, and not by the Fifth Amendment, *Billings* v. *United States* (1914) 232 U. S. 261, 282, 34 Sup. Ct. 421, unless the act complained of is so arbitrary as to amount to a taking of property.

WILLS AND ADMINISTRATION—VESTED INTEREST AFTER GIFT OF PERSONALTY IN TRUST FOR LIFE—WHEN ADMINISTRATION IS UNNECESSARY.—Where personalty was given to executors in trust to pay the income to A for life, "and at her decease the principal to go to" B, *held,* that B took a vested rather than a contingent interest so that, upon B's predeceasing A, it passed to B's representatives. At A's death, since there appeared to be no creditors of B's estate, the principal could be paid directly to the sole distributee of B, without administration. *Matter of Van Kleeck* (Surr. Ct., N. Y. Co., N. Y. 1916) 55 N. Y. L. J. 187.

A remainder given directly, after a gift in trust to pay the income for life, is vested, so that upon the death of the remainderman before the *cestui que trust,* the gift of the remainder does not lapse. *West* v. *Smith* (1911) 89 S. C. 540, 72 S. E. 395; *Matter of Heinze* (1897) 20 Misc. 371, 46 N. Y. Supp. 247; *Buswell* v. *Newcomb* (1903) 183 Mass. 111, 66 N. E. 592. Although generally all estates of decedents are subject to administration, the purpose of the administration is to pay off the debts of the estate and to effect distribution, and hence, where

there are no debts to be paid and distribution can be made otherwise, or where there is a sole distributee, administration may be dispensed with. Woerner, Administration § 201; *Glover* v. *Hill* (1888) 85 Ala. 41, 4 So. 613; see *Foote* v. *Foote* (1886) 61 Mich. 181, 190, 28 N. W. 90. Thus where there are no creditors and the distributees, all being adults, make a fair division of the estate by agreement without administration, a court of equity will uphold such a voluntary division. *McCaa* v. *Woolf* (1868) 42 Ala. 389, 394; *Brashear* v. *Conner* (1877) 29 La. Ann. 347; *Waterhouse* v. *Churchill* (1902) 30 Colo. 415, 70 Pac. 678. If no claims have been made, and the evidence before the court is to the effect that there are no creditors, the existence of debts will generally not be presumed, *McCaa* v. *Woolf, supra*; *Waterhouse* v. *Churchill, supra,* though it has been intimated that such evidence is not conclusive, and the statutory period must elapse before it can be ascertained that no debts exist. *Becraft* v. *Lewis* (1890) 41 Mo. App. 546; *McDowell* v. *Orphan School* (1901) 87 Mo. App. 386.

WITNESSES—IMPEACHMENT—ADMISSIBILITY OF EVIDENCE AS TO REPUTATION TO SUSTAIN.—In a civil action, the plaintiff, as witness in his own behalf, admitted on cross-examination a previous conviction for forgery. *Held*, it was error to thereafter exclude testimony as to his general reputation. *Derrick* v. *Wallace* (N. Y. 1916) 55 N. Y. L. J. 233.

Though neither in civil nor criminal cases is evidence of the defendant's reputation generally admissible in order to draw an adverse inference therefrom, still, when a party takes the stand as a witness, he is subject to all the rules applicable to witnesses. *People* v. *Newman* (1913) 261 Ill. 11, 103 N. E. 589; *Smith* v. *State* (1903) 137 Ala. 22, 34 So. 396; 4 Chamberlayne, Evidence §§ 3273-6. A witness may be impeached by testimony as to his reputation for truth and veracity, by proof of inconsistent statements, or by evidence of specific acts of criminal or moral turpitude, see *First Nat. Bank* v. *Blakeman* (1907) 19 Okla. 106, 91 Pac. 868; *Stevenson* v. *Gunning's Estate* (1892) 64 Vt. 601, 25 Atl. 697, but the mere introduction of contradictory evidence or proof of indictment for crime not followed by conviction will not suffice. *People* v. *Cascone* (1906) 185 N. Y. 317, 334, 78 N. E. 287; *Stevenson* v. *Gunning's Estate, supra.* And though former conviction for crime may be proved by the introduction of the record of conviction, still the general view, usually authorized by statutory provision, is that such conviction, or actual guilt without conviction, may also be brought out on cross-examination of the witness himself, and will be effective to impeach him. *Dotterer* v. *State* (1909) 172 Ind. 357, 88 N. E. 689; *State* v. *Hill* (1903) 52 W. Va. 296, 43 S. E. 160; *Kraimer* v. *State* (1903) 117 Wis. 350, 93 N. W. 1097. Though there is a conflict among courts when impeachment is by proof of former guilt or conviction for crime, 2 Wigmore, Evidence § 1106, still it is the better view that when a witness has been impeached in any way, evidence that his reputation for truth and veracity is good is admissible to sustain him. *Kraimer* v. *State, supra; Gazeway* v. *State* (1914) 15 Ga. App. 467, 83 S. E. 857. The admission of such rehabilitating evidence seems clearly correct, as it is entirely conceivable that a former criminal may have reformed and that, if such be the case, his previous moral turpitude should not be allowed to render his testimony unworthy of belief. *Shields* v. *Conway* (1909) 133 Ky. 35, 117 S. W. 340. This is the ruling of the principal case and it seems unquestionably sound.

BOOK REVIEWS.

IRA LLOYD LETTS, *Editor-in-Charge.*

CASES ON THE LAW OF PUBLIC SERVICE. By CHARLES K. BURDICK. Boston: LITTLE, BROWN AND COMPANY. 1916. pp. xiii, 544.

This case-book is the latest collection of precedents illustrating the evolution of the fluid and expanding body of law dealing with public service enterprises and their regulation. The editor has been able to avail of a large number of recent cases bringing down to date the developments in the law of the subject during the past two or three years—a period in which the United States Supreme Court and the various State Courts and Commissions have handed down many epoch-making decisions. The newness of the collection therefore makes the book invaluable for class-room work.

The arrangement and classification of the cases indicate a painstaking effort toward the logical development of the subject which has been successful in the main. In view of the complexities of this branch of law this is no mean accomplishment. The editor has been particularly happy in his selection of cases reflecting fundamental, and, in a sense universal, statutory policies and developments which have come to prevail in so many jurisdictions as to represent generally existing legal conditions.

It is not difficult to select cases illustrating the doctrines as to discrimination, for example, developed at common law in the absence of statutes. It is a matter calling for the exercise of sound judgment in the editor to select fairly illustrative cases exhibiting the generally adopted standards of prevailing statutes which have carried forward and developed the germs of the common law doctrines. The same observation applies to the many obligations of public service purveyors at common law and under statutes. The work of the editor in this selection shows a broad grasp of underlying principles and a well developed instinct for selecting excellent illustrative cases from the great amount of recent material.

The collection has one very grave fault which ought to be corrected in any subsequent edition, and that is the ruthless cutting of many of the cases in an effort at condensation. Numberless cases have been so cut that it is difficult, if not impossible, for the student to appreciate the facts and issues of the case without consulting the original reports. The effort to condense in this manner has robbed much of the material of its value along lines contemplated by the intelligent use of the case system of teaching law. The result is a statement of legal conclusions without putting in the hands of the student the foundation facts to which the conclusions were applied. This falls far below the aim of the case-method and really reaches a lower level that that attained by text-book instruction. The latter method at any rate has the merit of orderly and sequential statement which is entirely lost when miscellaneous emasculated cases are brought together.

Even with this serious fault the collection is the best thus far offered for use in the class-room as the basis for studying this engross-

ing and thoroughly live topic of the law. The fault is one easily remedied in the future editions which the other merits of the book are bound to insure.

Jackson E. Reynolds.

Federal Trade Commission Manual. By Richard S. Harvey and Ernest W. Bradford. Washington, D. C.: John Byrne & Co. 1916. pp. ix, 457.

In order to understand the nature and value of the "Federal Trade Commission Manual", it is necessary to have a somewhat detailed statement of its contents. The first half of the book is devoted to a discussion and interpretation of the Federal Trade Commission act, and the Clayton law. Following this there are successively: the rules of practice of the Federal Trade Commission, suggested forms for use in practice before the commission; the Federal Trade Commission act; the Clayton law; the Sherman anti-trust law; relevant portions of the Wilson Tariff law; the statute creating the bureau of corporations; the provisions of the federal constitution applicable to anti-trust laws; the portion of the Sundry Civil act relating to the non-prosecution of labor and agricultural organizations, statutory immunity provisions; provisions of the federal judicial code applicable; anti-monopolyprovisions of the Panama Canal act; the tentative forms of the Sherman law; the act to expedite anti-trust cases; the several reports of the Senate Interstate Commerce committee of 1913, together with the committee's proposed Trade Commission bill; senate report upon the history of injunctions, with remarks on existing law and practice; and the Interstate Commerce act. Finally there are memoranda of the cases instituted by the federal government under the anti-trust laws, revised to October 15, 1915, which contain the name of each case, the time when started, the object, and the measure of success obtained. Many cases are given which have not found their way into the judicial reports.

While a discussion of the points of law involved would be helpful, that is not within the scope of this manual, and the fact remains that this list of cases will prove valuable, to any one desiring to know the history of the anti-trust prosecutions. There are many commendable features about the manual. The style is clear and concise, and the work is enlivened by many striking phrases and telling figures of speech. The authors have a thorough knowledge of the history of politics and economics, which they use most helpfully.

Dean Wigmore, in the preface to the supplement to his epoch-making treatise on evidence says, "For ten and twenty years past there have been at the service of the profession some half a dozen legal periodicals, publishing the weightiest critiques of current legal problems. There is nothing in judicial opinion to show that these articles have ever been read; apparently their great labor and acute skill have been wasted on the judges". This labor and skill has also been wasted on many text-book writers. It is submitted that reviewers of law-books should in practically every instance state whether, or not, this most valuable source of material has been utilized. However, this manual, in addition to the citation of several law review articles, has a bibliography in the preface, and many references throughout the text to widely scattered sources of material, including even the statutes of several other countries. The authors in some cases do

not merely cite the leading authorities, but quote their views at length. There is little criticism of the book so far as matters of form are concerned. That considerable care has been used is shown by the facts that duplicate citations of cases are uniformly given, and that quotations are set off from the body of the text. Time could have been saved by placing at the top of each page of the text of the Federal Trade Commission act, the Clayton law, and the Interstate Commerce act some indication of the sections printed on that page. The idea of having a black-letter catch-word at the beginning of a paragraph, giving the gist of that paragraph is to be commended. To return to things more vital, the order and analysis are excellent. The distinctions between the Federal Trade Commission act and the Clayton law are carefully pointed out, and there is practically a complete construction of each statute, except when there is not a sufficient foundation for construction, in which case it is left for the future decision of the courts. Several parts of the manual are especially good; the history of the Sherman law, the discussion concerning the application of anti-trust laws to labor unions, and the chapter entitled, "Unfair trading in relation to trade-marks and trade-names". In this last mentioned chapter, many illustrative cases render the text extremely clear. Throughout the entire work, there is no attempt to be pedantic. The book is just what it appears to be; a plain common sense treatment of the subject for practical use.

Dewitt B. Wyckoff.

SHIPPERS AND CARRIERS OF INTERSTATE AND INTRASTATE FREIGHT. Second Edition. By EDGAR WATKINS, LL.B. Atlanta: THE HARRISON COMPANY. 1916. pp. cxv, 1057.

The enormous increase in corporate organization of business enterprises during the last half-century has in no field given rise to more perplexing problems of governmental regulation and control than in the domain of transportation. The complicated interplay of opposing interests, the constant clash of private property rights with the requirements of public policy together with the vast sums invested in the business of common carriage and the enormous amount of freight and passenger traffic handled by these enterprises, present some of the most difficult and pressing questions of modern legal and economic policy. The restraints imposed upon common carriers by the common law having proved inadequate to the requirements of modern industrial organization, resort was had a decade or two ago, to direct legislative enactment of complicated regulations and even of rate schedules for public service enterprises. But legislatures generally proved so lacking a knowledge of actual conditions in the business they attempted to control, that this method proved unsatisfactory, especially since many of the statutes so enacted were declared confiscatory and unconstitutional by the courts. Resort was therefore had to the third method of regulation, namely, the delegation of legislative power to commissions, both state and federal. Through a development of this system the solution of the problem will apparently be reached.

The rapidity with which commission control of common carriers is being developed is strikingly illustrated by the differences between the first and second editions of Mr. Watkins' work on Shippers and Carriers representing the advances in this field during the last seven years. The first edition published in 1909 contained 578 pages with a

supplement of 60 pages added in 1910. The edition or 1916 contains 1057 pages. This increase is in part represented by the inclusion of the complete text of the Conference Rulings of the Interstate Commerce Commission and the expansion of the thirteen pages devoted by the first edition to procedure before that body into a chapter of thirty-three pages, including forms. But the chapter on State Regulation of Carriers in Interstate Commerce, which in the edition of 1909 covers forty-nine pages appears in a new position in the second edition expanded to one hundred and ten pages. The increase of important federal legislation on the subject is shown by the inclusion in the new edition of matter relating to the Panama Canal Act of 1912, dealing with railroad-owned ships, the Clayton and Federal Trade Commission Acts of 1914, and the Amendment of 1910 to the Act to Regulate Commerce giving the Interstate Commerce Commission power to suspend tariffs affecting or increasing rates. This last provision has obviated the necessity of enjoining the collection of increased rates pending action by the Commission and the Chapter in the first edition dealing with the power of the courts so to do is therefore reduced to a few sections. The discussion of the corporation-tax provisions of the Payne Tariff Law, which was included in the earlier edition has been omitted as not within the peculiar province of a work on shippers and carriers. The annotations of the Act to Regulate Commerce, including both decisions of the courts and opinions of the Interstate Commerce Commission have been brought down to date by the addition after each section of a separate paragraph devoted to "Notes of Decisions Rendered Since 1909". The exhaustive index greatly facilitates the use of what must be regarded as a very comprehensive and valuable work in an important and rapidly developing field of law.

Richard Storrs Coe.

A Digest of English Civil Law. Edited by Edward Jenks, M. A., B. C. L. Book IV, Family Law. By W. M. Geldart, M. A., B. C. L. Book V, Succession. By W. S. Holdsworth, D. C. L. Boston: The Boston Book Co. 1916. pp. liii, 1155-1294.

It is very pleasing to find that the disturbed conditions in England, while interfering somewhat with the preparation, are not preventing the completion of the admirable series of digests of the law of that country, which have been published from time to time during the last few years under the able editorship of Professor Edward Jenks. The use of the title "A Digest of the English Civil Law" has led to confusion with the law of continental Europe in the minds of many, who failed to realize that "civil" was used in contradistinction to "criminal". In reality the work is an admirable summary of the present law of England, presenting the common law, statutes and judicial interpretations on any subject welded into one orderly and comprehensive exposition. To one who is accustomed to the bulky American digests, with their array of conflicting decisions, the simplicity and clarity of this work are refreshing.

The present volume consists of Book IV on Family Law, by Professor W. M. Geldart, and the first part of Book V on Succession, covering Testamentary Succession, by Dr. W. S. Holdsworth, comprising the subjects commonly referred to in this country as domestic relations and wills. The remainder of Book V, dealing with Intestate

Succession and the Distribution of Assets, together with general indexes, are expected to constitute the final volume of the series.

That Dr. Holdsworth and Professor Geldart have done their work accurately and well, hardly needs saying. But they have done more than this and are to be congratulated on preserving the admirable characteristics of earlier volumes. Not only are the books so arranged, with liberal spacing and marginal references, as to be convenient for purposes of reference, but they are also so written, in a pleasing style with the statement of law easily separable from the references, as to present a series of very readable as well as valuable essays on the different subjects discussed. Whatever the practical value of these books as an index of law to the English practitioner, to the American it must necessarily be comparatively small except to the student, to whom they present admirable outlines of various branches of the law.

Merrill N. Gates.

Books Received.

Essentials of Veterinary Law. By Henry Bixby Hemenway, A.M., M. D. Chicago: T. H. Flood & Co. 1916. pp. xiv, 319.

American Public Health Protection. By Henry Bixby Hemenway, A.M., M.D. Indianapolis: Bobbs-Merrill Co. 1916. p. 283.

A Treatise on the Conflict of Laws. By Joseph Henry Beale, Vol. I, Part 1. Cambridge: Harvard University Press.. 1916. pp. lxxx, 189.

The Gist of Real Property Law. By Harold G. Aron, M.A., LL.B. New York: Writers Pub. Co. 1916. pp. xiii, 265.

Criminality and Economic Conditions. By William Adrian Bonger. Boston: Little, Brown & Co. 1916. pp. xxi, 706.

A History of Continental Criminal Law. By Carl Ludwig Von Bar. Boston: Little, Brown & Co. 1916. pp. lvi, 561.

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POWERS AND THE RULE AGAINST PERPETUITIES.

DEFINITION OF A POWER.

A power may be defined generally as the property of a substance or being that is manifested in effort or action and by virtue of which that substance or being produces a change moral or physical. Since the discussion will relate to powers to produce a change in the ownership of property the definition may be confined accordingly and will therefore appear as follows. A power is the attribute of an individual manifested in action by which the individual produces a change in the ownership of property.[1] The law, however, has frequently to consider a power before it is exercised; consequently we say an individual has a power when he may by virtue of the power produce a change irrespective of whether the power has been exercised or not.

Such a power may arise in one of three ways. (1) Where the power is exercisable by an owner of property by virtue of and as part of his ownership. This is not strictly speaking a legal power but more accurately an incident of ownership. (2) Where the owner of property by contracting with another party confers on the other a power with respect to the property.[2] (3) Where the owner of property confers on another a power[3] to produce a change in the ownership of the property in which case he may

[1]The word individual should be understood to include corporations or any other owner of property.

[2]*Cf.* London & S. W. Ry. *v.* Gomm (1881) 20 Ch. D. 562; Trevelyan *v.* Trevelyan (1885) 53 L. T. R. 853; Gilbertson *v.* Richards (1859) 4 H. & N. 276; Kenrick *v.* Dempsey (1856) 5 Grant 584 discussed Gray, Rule Against Perpetuities (3rd ed.) § 485.

[3]In exercising these powers the donee acts in his own name in which respect they are to be distinguished from the cases of an attorney or agent who acts in the name of his principal.

confer an estate less than absolute ownership with the power or may confer a power without any estate in the property.[4] It is our purpose to discuss the application of the Rule against Perpetuities to limitations arising under powers of the third class.[5]

DIVISION OF POWERS.

These powers may,[6] for the purpose of this discussion, be classified under the following headings: A. Powers in an executor,[7] B. Powers in a trustee,[8] C. Powers in trust,[9] D. Powers of appointment,[10] E. Powers of revocation.[11]

There are several principles common to all of these powers which require preliminary attention before proceeding to the consideration of each one in detail.[12]

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[4]It will be observed that powers of the third class are conferred by the exercise of powers of the first class.

[5]The law relating to the application of the Rule against Perpetuities to limitations under powers is of very recent development. Mr. Chance writing in 1831, repeated in edition of 1841 at section 302, says: "There is not much in the books with reference to the law of perpetuity, as particularly applicable to powers; we may briefly notice the subject, so far as concerns the creation of powers, under five divisions."

[6]The distinction between legal and equitable powers does not seem to be of any importance in the present discussion.

[7]*e. g.*—To my executor with power to sell real estate to pay legacies and debts or for distribution.

[8]*e. g.*—To *A* in trust for *B* for life, and after his death to *X* and his heirs with power in *A* to sell real estate at any time during the continuance of the trust.

[9]The distinction between a power in trust and a power in a trustee is this: a power in trust is where the sole benefit to the parties entitled lies in the exercise of the power, and when that is done or disposed with, the trust terminates.

A power in a trustee is where the trustee, who has the legal title subject to a super-imposed trust, has vested in him power with respect to the trust property, and where the trust still continues, whether the power is exercised or not. Two examples will illustrate the distinction:

To *A* in trust for *B* for life, and after his death to *V* and his heirs, with power in *A* at any time during the trust, to sell any or all of the trust property and invest the proceeds upon the same trusts. This is a power in a trustee.

To *A* with a direction or power to sell the real estate and divide the proceeds among *B* and his heirs on or before the death of *C*, a living person. This is a case of a power in trust.

[10]*e. g.*—To *A* for life with power to appoint by will.

[11]*e. g.*—Deed by *A* to *B* in trust for *C* for life, &c., with power in *A* at any time to revoke and declare new uses.

[12]The distinction between the different kinds of powers in this connection is generally overlooked. 1 Chance, Powers, 302 divides the subject as follows: 1. Power to reduce an unborn tenant in tail to a tenant for life. 2. Common powers of sale in a will. 3. Common powers of sale and exchange. 4. Powers of leasing. 5. Miscellaneous cases.

Mr. Marsden, Perpetuities at p. 234, makes no division of powers at all and discusses them as if they were all subject to the same general principle.

THE RULE APPLIES TO THE LIMITATIONS UNDER THE POWER.

The Rule against Perpetuities has for its object the destruction of future interests which may vest at a remote period. The rule, therefore, does not apply to the power, but applies, if it applies at all, to the future interest limited under the power. There is nothing in the terms of the rule, whichever way it is stated, or in its history, to warrant the notion that it has anything to do with the validity or operation of a power of any kind. The questions to be considered are: (1) Is the power valid, *i. e.*, can it be lawfully exercised? (2) If it can, has it been exercised according to its terms, and are the limitations thereunder such as are thereby authorized? (3) If these two questions are answered in the affirmative, can the limitations take effect? The Rule against Perpetuities is involved in the third question only. The answers to the first and second are to be found in the law of powers. The rule, therefore, has no concern with the circumstance that the power may be exercised at any future period, whether remote or not. It has never been supposed that the rule applied, for instance, to the birth of the great-grandchild of the testator, or to the return of *B* from Rome, although it may apply to the interests limited to take effect on the happening of these events. It appears, therefore, that the Rule against Perpetuities touches powers only in so far as the interests limited under them violate the rule. It is, of course, true that as the rule destroys the interest limited under the power, it produces the practical consequence that sometimes the power is nugatory. If the power is exercised and an attempted limitation made, the person specified has no title, not because the power is bad, but because of the application of the rule to the interest.

The first question therefore is this—Does the rule apply to the

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Mr. Lewis, Perpetuities discusses the subject under two chapters: Chap. 20. powers of appointment and limitations in pursuance thereof; Chap. 23, limitations and exercise of powers of sale, exchange, partition, leasing and the like. The learned author, however, does not clearly distinguish between these powers in his discussion. Mr. Gray, Rule Against Perpetuities (3rd ed.) 1915, § 473 considers all powers as subject to three principles which he states as follows: "In powers, questions of remoteness are governed by three rules. 1. If a power can be exercised at a time beyond the limits of the Rule against Perpetuities, it is bad. 2. A power which cannot be exercised beyond the limits of the Rule against Perpetuities is not rendered bad by the fact that within its terms an appointment could be made which would be too remote. 3. The remoteness of an appointment depends on its distance from the creation and not from the exercise of the power. The first two rules relate to the creation of powers, the third rule to their execution."

limitations under the power at all? If it does apply we then have the question, since a power is always created by some instrument, as a deed or will, of the time from which the period prescribed by the rule runs, whether from the time of the creation of the power or from the time of its exercise.

The notion that a power may be remote—that the rule applies to the power—is strongly embedded in the books, and has no doubt caused much confusion,[13] although some text writers appear to recognize the principle that the rule applies to the limitation and not to the power.[14]

EXCEPTION IN CASE OF POWERS.

The further question arises as to whether a limitation under a power in conformity with the general rule must vest within the period prescribed, or whether an exception arising by reason of the intervention of the exercise of the power will be allowed and a limitation admitted, which, as it turns out, vests in time, although looking forward from the time of the creation of the power there was a possibility that it might not vest in time.[15] The extent of

[13]Mr. Marsden, Perpetuities, 234 says, "A power may be void for remoteness in (1) the scope or purpose of the power, (2) the subject matter (3) the donee, (4) the objects, (5) the origin, (6) the duration, and (7) the time at which the power is exercisable." This, however, perpetuates the unfortunate notion that the rule applies to the power, and introduces an analysis of the particulars in which the exercise of the power may create limitations violating the rule, which is not easy of comprehension, and is difficult to square with the authorities. Mr. Gray, Rule against Perpetuities (2nd ed.) §§ 473, 475, 476, 535, speaks of a power as being void because remote, but in the third edition of his book (1915), § 474*a* and 474*b*, he calls attention to this inaccuracy. The notion of the remoteness of the power appears in several recent discussions: A. M. Kales, 26 Harvard Law Rev. 64; J. L. Thorndike, 27 Harvard Law Rev. 705 and in the same volume at 709-710, the latter author notices the point taken by Mr. Gray, that it is not the power which is remote, without, however, offering any answer.

[14]"The period for the commencement of the limitations in point of perpetuity is the time of the execution of the power." 1 Sugden, Powers (8th ed.) 395, 396; Mr. Challis, Real Property (3rd ed.) 193, says: "When an executory limitation arises under the exercise of a special power of appointment, the time from which the period prescribed by the rule begins to run, is the date of the coming into operation of the original instrument creating the power, not that of the instrument by which the power is exercised."

[15]Mr. Hayes, Common Law, 57, 70, says: "As a general principle, every limitation which trangresses the rule is altogether void in its inception; though this principle appears to have been, in some degree, disturbed by holding all executory limitations, in defeasance of an estate tail, to be good in their creation, and by the indulgence, extending more recently to powers."

this exception will be discussed separately with reference to each particular power as the rule differs in the several cases.[16]

DESTRUCTIBLE POWERS.

An interest destructible by the owner of the fee is not remote from any point of time. The common law seems to avoid any regulation of a subject which is sufficiently controlled by individual action.[17] There is no occasion, therefore, for the law to destroy such a future limitation as the self-interest of the owner may be sufficiently relied on to promote the public policy which has in view the destruction of remote future interests.[18] A limitation which may be made under the destructible power is governed by the same principle.

A destructible power may therefore be defined as a power exercisable as to a legal title, which title is subject to the uncontrolled disposition of the absolute owner. The power, therefore, exists only by the sufferance of the owner, and any exercise of it is regarded as made with his consent and therefore judged as if exercised by him. The limitations made by the exercise of the power are subject to the Rule against Perpetuities and their remoteness is determined by the distance in time from the exercise of the power. So long as such a power remains unexercised there is nothing for the Rule against Perpetuities to operate on. This is believed to be the real principle involved in the decisions collected in the note.[19]

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[16]We must distinguish between the cases where the limitations which were in fact made under the power were held void for remoteness and the case where the power was not in point of fact exercised, consequently no limitations made but as the power might create limitations which would violate the rule it was held impossible to exercise it so as to create valid limitations.

[17]A similar application of this principle is to be found in the law of contracts in restraint of trade. They were not void *per se* at common law, which took no notice of them until a party interested set up their invalidity. The shifting from this individualistic point of view to the modern theory of interference by the State is illustrated by the provisions of the Federal Anti-Trust Law of 1890.

[18]Gray, Rule against Perpetuities (3rd ed.) §§ 443, 482; 3 Preston, Abstracts 286 *semble*; 3rd Report of Real Property Commissioners (1833) 34. These authorities, however, do not assign the reasons stated in the text.

[19](*a*) Powers destructible by the barring of an estate tail: Waring *v.* Coventry (1833) 1 Myl. & K. 249; Cole *v.* Sewell (1842) 4 Dorr & W. 1; Ferrand *v.* Wilson (1845) 4 Hare 343, *semble*; see Gray, Rule against Perpetuities (3rd ed.) §§ 502, 503; Lantsbery *v.* Collier (1856) 2 Kay & J. 709, *semble*; Briggs *v.* Earl of Oxford (1852) 1 De. G. M. & G. 362; *In re* Earl of Stamford & Warrington [1912] 1 Ch. 343; Barber *v.* Pittsburgh, F. W. & C. Ry. (1897) 166 U. S. 83, 17 Sup. Ct. 488,

The common statement is that the powers are valid or not remote. They may sometimes be remote as of the date of their creation, but the running of the period prescribed by the rule has been stopped by the circumstance that in the meantime the real owner of the fee has come into complete control thereof.[20]

There is another matter to be noted. The judges and text writers constantly speak of a power as void in its inception, and when valid in its inception, as void in its execution. This language betrays the confusion in thought resulting from the notion that the rule applies to the power, that is, that a power may be remote. By the expression "power void in its inception", is meant a power under which no limitation can ever be made which will conform to the Rule against Perpetuities. This expression has,

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semble; see Gray, Rule against Perpetuities (3rd ed.) § 509 q. Where, however, the limitations are antecedent to the estate tail and indestructible by barring the entail the Rule against Perpetuities applies. Case *v.* Drosier (1837) 2 Keen 764; Floyer *v.* Bankes (1869) L. R. 8 Eq. 115; Cochrane *v.* Cochrane (1883) 11 L. R. Ir. 361.

(*b*) Powers in a trustee of a trust which may be determined at any time by the *cestui que trust* calling for the legal title to the fee. Wallis *v.* Freestone (1839) 10 Sim. 225; Lantsbery *v.* Collier (1856) 2 Kay & J. 709, *semble*; *In re* Brown's Settlement (1870) L. R. 10 Eq. 349; *In re* Cotton's Trustees (1882) 19 Ch. D. 624; Hasker *v.* Summers (1884) 10 Vict. L. Rep. Eq. 204; Hart *v.* Seymour (1893) 147 Ill. 598, 25 N. E. 246; O'Rourke *v.* Beard (1890) 151 Mass. 9, 23 N. E. 576; Howe *v.* Morse (1899) 174 Mass. 491, 55 N. E. 213; Pulitzer *v.* Livingston (1896) 89 Me. 359, 36 Atl. 635; Cooper's Estate (1892) 150 Pa. 576, at 585, 24 Atl. 1057; Reed's Estate (1910) 37 Pa. C. C. R. 205.

(*c*) When the trust terminates, an absolute interest necessarily becomes vested in one or more persons. If the subject matter is real estate, and the circumstances are such that the Statute of Uses applies, the power of the trustee fails, as the legal title is at once taken away from him by force of the statute; and the powers have nothing upon which to operate. Where the statute does not apply, the party or parties are entitled to call for a conveyance of the legal title. It remains in the trustee, if at all, by sufferance only, and the powers are at any time destructible by the parties to which the proceeds belong. Any limitations by the trustee in such case are, in effect, limitations by the *cestui que trust*, who is the real owner, as they are made by his sufferance only.

(*d*) So also powers of sale conferred upon mortgagees, their heirs, executors and administrators fall within the same principle because the mortgagor may always destroy them by paying off the mortgage. *Cf.* Hayes Introd. to Conveyancing (3rd ed.) 469 n. 127; Lewis, Perpetuities 561.

(*e*) Property is frequently conveyed to trustees, in trust, to secure bonded indebtedness, and in such cases there is frequently inserted in the deed of trust a power of sale to be exercised, if occasion requires, for the benefit of the purchasers of the bonds. There was such a power in the case of Bancroft *v.* Ashhurst (Pa., 1860) 2 Grant 512, but no question as to the application of the rule was raised.

[20]Mr. Gray, Rule against Perpetuities (3rd ed.) § 509 J. says, "That powers which can be destroyed by those equitably interested in an estate demanding a conveyance are not too remote, seems never to have been directly held in England, but there is no decision inconsistent with such a view."

however, sometimes been applied to powers which might be exercised so as to create a valid limitation. By a power valid in its inception but void in its execution, is meant a power under which valid limitations can be made but whch in fact has been so exercised as to create a void limitation. These cumbersome phrases are not necessary to the proper understanding of the subject and will be eliminated from the discussion in the interest of clear thinking.

We are now in a position to discuss the application or the non-application of the Rule against Perpetuities to the limitations under the various kinds of powers which have been pointed out in the order named.[21]

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[21]It is believed that the ulterior object of the Rule against Perpetuities is to promote alienability, which it accomplishes by destroying those future interests which do not vest within a certain period, and by so doing hastens the restoration of the property to its former condition of absolute ownership in one individual, the state of affairs most favorable to alienability. With this principle in view we may lay out the discussion under the following headings:

1. The Rule against Perpetuities is not called for unless the absolute ownership is split up into a series of estates.

2. The period prescribed by the rule begins to run from the time the absolute ownership is split up, and a new period cannot start until the fee has been restored to its former condition, which restoration may be accomplished in fact or by way of fiction.

3. Some of the future estates may arise by the execution of a power, as to which estates the rule applies.

4. These powers arise somewhere in the projection of the estates during the running of that period, and may be exercised to create a link in the chain of limitations as powers of appointment, powers in a trustee as to the equitable estate, powers in trust, and powers of revocation, or may be exercised independently of the limitations as powers in an executor and powers in a trustee as to the legal title.

5. The sole difficulty in the case of powers is, in answering the question: does the exercise of a power stop the running of the period prescribed by the rule and start a new period from the time of the exercise?

6. Where the power in the chain of limitations is of such a nature that the donee may restore the property to its former condition of absolute ownership he may be regarded as having done so by way of fiction unless he has in fact done otherwise and a new period will begin to run.

a. A power to appoint by deed or will unrestricted as to objects is such a power.

b. There is a difference of opinion as to whether a power to appoint by will only unrestricted as to objects is such a power.

7. In all other cases of powers in the chain of limitations the exercise of the power does not stop the running of the period.

8. In the case of powers independent of the limitations there is a conflict of opinion. It seems to be generally held in practice in effect that the period runs from the time of the exercise of the power. There is strong opinion among the text writers to the contrary. No case, however, has arisen in which the limitation under such a power has been remote from the time of the creation of the power.

9. The power in the chain of limitations is a joint introducing a certain flexibility in consequence of which an exception has been allowed to the strict rule that a limitation is void unless it must, speaking from the time the absolute ownership is split up, vest within the period. It is not clear, however, how far this exception extends.

POWERS IN AN EXECUTOR.

An executor is one appointed to the office of executing a man's last will and testament, and in strictness the executor has to do only with personalty. A will relates to lands, and a testament relates to personal property, and if a person is named as trustee, he must be so specifically designated in the will. A will, furthermore, is a mere devise of real estate and needs no executor; consequently a power of sale contained in a will is a common law power and to be strictly construed as such. At common law the power to sell conferred upon the executor was a mere warrant of attorney, did not pertain to him as executor, and therefore did not pass to his successors in the office but died with him.[22] The case of a power in an executor *qua* executor is always a power in trust. The case generally presented is that of a power to sell real estate, and the power may be appendant when the executor has the title, or in gross when the title is in the heir or devisee.[23] Where a trust is created under the will, the powers conferred, if any, are powers in a trustee. It is often a difficult matter to determine when the executorship ends and the trusteeship begins.

Since it is the duty of an executor to settle up the estate as rapidly as possible, any powers vested in him as executor will be exercisable only for that purpose and only until the final settlement. The time spent in settling the estate is always under the control of the specific and residuary legatees and devisees. Consequently, the executor's powers are always destructible by them unless exercised immediately after the testator's death.

If the duties of executor and trustee are kept clearly defined it is probable that no case will arise where the duties of the executors will extend beyond 21 years from the death of the testator. When those duties end any power of sale in the executor will fall.

If, therefore, such a power is regarded as destructible, the period prescribed by the rule will run from the time of its exercise. On the other hand, if we adopt the theory that the duties and powers of the executor must be exercised within a reasonable time after the testator's death, and that the executor acts by delegation from the testator, the period will run from the time of the creation of the power.[24]

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[22]This difficulty has been overcome by statute in many jurisdictions.

[23]The common case of a naked power of sale.

[24]There is an almost complete dearth of authority on powers of sale in an executor. Mr. Marsden, Perpetuities, 247, in speaking of a power of sale for raising money to pay debts, etc., says: "Such a power is in

POWERS IN A TRUSTEE.

Powers in a trustee are powers conferred upon the trustee enabling him to deal, 1. with the legal title free from the claim of the *cestui que trust,* 2. with the equitable title.[25]

POWERS IN A TRUSTEE AS TO THE LEGAL TITLE.

Powers vested in a trustee as to the legal title simply enable him to dispose of the title free of the claim of the *cestui que trust.* That this is so appears from the fact that even without the power he may freely dispose of the title to a purchaser for value without notice. He therefore has power to dispose of the title as *dominus* without reference to the power, and cannot be said to be acting under it so far as his limitations of the title at law are concerned. Powers of sale, exchange and leasing, partition and mortgage, are the common instances which occur in modern times. Powers to lease will be separately discussed, and since powers of sale, exchange and partition are of the same nature, the discussion will, for convenience, be confined to powers of sale.[26]

Where the circumstances are such that the *cestui que trust* is entitled to terminate the trust, the power in the trustee falls with the trust and no question can arise as to the validity of any limita-

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the nature of a trust, the beneficial interest under which vests within the legal period. It would seem also that it is not, in fact, exercisable beyond the line of perpetuity, or indeed beyond a reasonable period from the testator's death." See also Lewis, Perpetuities 558, 559, quoting Third Report of Real Property Commissioners, (1833) 35; Mr. Gray, Rule against Perpetuities (3rd ed.) § 486, says the power is valid because it must be exercised within a reasonable time, and creditors and legatees have a present right to have the property at once. In Persons *v.* Snook (N. Y., 1862) 40 Barb. 144, a naked power of sale in an executor was considered as being in violation of the New York Revised Statutes. In Atwater *v.* Russell (1892) 49 Minn. 22, 51 N. W. 624, the executors were to sell as soon, in their judgment, as the property could be sold for a reasonable price, which was held unobjectionable under the Minnesota Statute.

[25]An example will illustrate the distinction: To *A* in trust for *B* and *C* for life, and after the death of the survivor, to *X*, and his heirs, with power in the trustee to apportion the income between *B* and *C* in such proportions as he shall think fit. This is a power to affect the equitable estate.

To *A* in trust for *B* for life, and after his death to his children then living, for their lives, and after the death of the survivor, to the *Y* charity, with power in the trustee to sell the trust property at such times and at such prices as he may think best. This is a power to affect the legal title.

[26]Nearly all the decided cases appear to involve powers of sale. The case of a power to purchase land should be governed by the same principle although no decision has been found and the question is not noticed by the text writers.

tions made by its exercise, although in some cases the court has supposed that the unrestricted power in the trustee was material in determining the validity of the trust.[27] So also the circumstance that the trust is sustained is immaterial as the trust may remain even though the power cannot be validly exercised.[28]

APPLICATION OF RULES TO POWERS IN A TRUSTEE AS TO THE LEGAL TITLE.

There has been considerable difference of opinion over the application of the Rule against Perpetuities. It is, of course, clear that the rule applies to the limitations made by the exercise of the power just as to any other limitations, and that the only question really involved is as to the date from which the period prescribed by the rule begins to run. Two cases may arise: 1. where the limitations are such that the power must be exercised within the period prescribed by the rule dating from the time of the creation of the power.[29] 2. where the power is unlimited as to the time of its exercise.

POWERS IN A TRUSTEE AS TO THE LEGAL TITLE EXERCISABLE ONLY WITHIN THE PERIOD.

In the first case the power is, according to the common statement, valid. In all of the cases which have arisen, the power has been exercised to create an interest arising and vesting at the time of the exercise of the power, consequently it has never been necessary to inquire whether the period prescribed by the rule runs from the time of the exercise of the power. While such a power might be exercised so as to create a limitation remote from the time of the creation, no such case has been found in the books. It is generally said in these cases that the power is valid without any statement of the underlying reasons. In the cases collected in

[27]See note 19b *ante*; Barnum *v.* Barnum (1866) 26 Md. 119; Seamans *v.* Gibbs (1882) 132 Mass. 239; Wheeler *v.* Fellowes (1884) 52 Conn. 238; Cooper's Estate (1892) 150 Pa. 576, 24 Atl. 1057; Walsh *v.* Waldron (1892) 63 Hun 315, 17 N. Y. Supp. 829; Haynes *v.* Sherman (1889) 117 N. Y. 433, 22 N. E. 938. In Hutchison's Appeal (1876) 82 Pa. 509, the court held, in refusing partition, that it was immaterial that the power of the trustee might be exercised so as to create a perpetuity.

[28]Accordingly no question as to the power was involved in these cases where the trust was sustained. Armstrong *v.* Barber (1909) 239 Ill. 389, 88 N. E. 246.

[29]This may occur because the power is expressly limited to be exercised within the period, or the terms of the trust to which it is attached are such as to control the exercise of the power within that period.

the note,[30] a power of sale was either expressly limited to be exercised within the period or so confined by the terms of the trust to which it was attached.[31]

POWERS IN A TRUSTEE AS TO THE LEGAL TITLE EXERCISABLE AT A REMOTE PERIOD.

Where the power in a trustee as to the legal title is exercisable at a remote period some difficulty arises. The question here again

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[30]In the following cases the power of sale in the trustee was exercisable upon the construction adopted only within a period which was not remote dating from the time of the creation of the power, and it was held or agreed that the Rule against Perpetuities did not apply. Biddle *v.* Perkins (1829) 4 Sim. 135; Powis *v.* Capron (1830) 4 Sim. 138; Boyce *v.* Hanning (1832) 2 Cromp. & J. 334; Wood *v.* White (1838) 4 Myl. & C. 460, *semble*, question of remoteness passed over. Nelson *v.* Callow (1848) 15 Sim. 353; Taite *v.* Swinstead (1859) 26 Beav. 525; *In re* Tweedie & Miles (1814) 27 Ch. D. 315 discussed in Gray, Rule against Perpetuities (3rd ed.) § 509-c. Mandlebaum *v.* McDonnel (1874) 29 Mich. 78; Wilkinson *v.* Buist (Pa., 1889) 23 W. N. C. 311; Heard *v.* Read (1898) 171 Mass. 374, 50 N. E. 638.

Where there is a power of sale vested in a trustee the question will often arise whether the power is still valid to be determined by the construction of the terms of the trust and when the decision is that the power fails after a certain time and that time is within the Rule against Perpetuities no question as to remoteness is presented. Such was the case in the following decisions: Wolley *v.* Jenkins (1856) 23 Beav. 53, s. c. 3 Jur. N. S. 321; Romilly M. R. at page 361 said that the exercise of the power had been in terms confined to the period prescribed by the rule probably in consequence of an apprehension which prevailed that such powers unlimited in time were void as offending the Rule against Perpetuities, which apprehension was not founded in law. *In re* Brown's Settlement (1870) L. R. 10 Eq. 349.

In many cases of trusts the question has arisen whether the trustee can exercise a power of sale after the termination of the first living estates. It is clear that the period of 21 years has still to run so far as the Rule against Perpetuities is concerned and an exercise during that period would be valid. In these cases the Courts have said that by the terms of the trust the power was to be exercised within a reasonable time after the death of the life tenant and did not violate the rule. *In re* Lord Sudlley and Baines & Co. [1893] 1 Ch. 334; Peters *v.* Lewes & E. G. Ry. (1881) 18 Ch. D. 439 dictum Jessell M. R.

[31]No question as to the application of the Rule against Perpetuities will be involved in the following cases: (a) Where the question is whether the partition will lie: Biggs *v.* Peacock (1882) 20 Ch. D. 200; Boyd *v.* Allen (1883) 24 Ch. D. 622; Bigelow *v.* Cady (1897) 171 Ill. 229, 48 N. E. 974; Armory *v.* Lord (1853) 9 N. Y. 403. (b) Where there is a restraint on the time of the sale: Rosher *v.* Rosher (1884) 26 Ch. D. 801; Winsor *v.* Mills (1892) 157 Mass. 362, 32 N. E. 352. (c) Where the trust property has been sold and the controversy is over the distribution of the proceeds: Clark *v.* Platt (1861) 30 Conn. 282; Brewer *v.* Brewer (N. Y., 1877) 11 Hun 147. (d) Where there is an action to set aside a deed of settlement on the ground of duress: Fonseca *v.* Jones (1911) 21 Manitoba, 168. (e) In Want *v.* Stallibrass (1873) L. R. 8 Exch. 175, the vendee sued for return of the deposit money and recovered, and no question was raised as to the power of sale. (f) Where there is a proceeding by the creditor of a *cestui que trust* to reach the debtor's interest in the estate, and the question is what that interest is: Haxton *v.* Corse (N. Y., 1848) 2 Barb. Ch. 506.

is, from what date does the period prescribed by the rule run. This question, however, is never asked. The conventional view is that the validity of the power is determined by its remoteness from the time of its creation.[32]

The law on this subject, however, is in a very curious condition, and a great deal of learning and ingenuity has been expended without any very substantial results. There is apparently no express authority,[33] and the general opinion in practice seems to be according to the common statement, that such powers are valid. There is a conflict of opinion amongst the text writers[34] although

[32]There is, therefore, some inaccuracy in Mr. Gray's language, Rule against Perpetuities (3rd ed.) § 487, when he says, that such powers do not form exceptions to the Rule against Perpetuities.

[33]See remarks of Mr. Lewis, Perpetuities 548.

[34]For a discussion of the learning on the subject, see Gray, Rule against Perpetuities (3rd ed.) §§ 487-507. Lewis, Perpetuities, Ch. XXV, 541. The reader will observe that the language which Mr. Lewis uses in summing up the views of the different text writers is very inaccurate and confusing. He mixes up powers of appointment with powers in a trustee, and it seems that a large part of the difficulty in the subject has arisen from the failure to sharply distinguish between these two powers.

Many text writers and judges follow the dictum of Lord Eldon in Ware *v.* Polhill (1805) 11 Ves. 257, at 283, and take the position that the power is void because remote; Lewis, Perpetuities, 556. On page 560, however, this learned author admits that the courts may find some practical ground for excluding such powers from the operation of the rule. In Cresson *v.* Ferree (1872) 70 Pa. 446 there was a power of sale vested in trustees, unlimited as to time. A sale was made by the trustees under the power during the continuance of the trust, and the purchaser refused to take title. On a case stated, it was held that the title was good, and that the exercise of the power by the trustee was valid. Sharswood, *J.*, in the Supreme Court, said, "We may concede that a general power over an estate, without limitation of time—unless after an estate tail—would violate the rule against the creation of perpetuities. In this case, however, the power of sale is clearly limited to the period during which the trusts created by the will subsist, or some of them; and that cannot exceed a life or lives in being at the death of the testator."

In Wilkinson *v.* Buist (1889) 124 Pa. 253, 16 Atl. 856, there was a power of sale in the trustees unlimited as to time. The court in an opinion by Clark, *J.*, said that the other provisions of the will indicated that it was to be exercised only during the lifetime of the widow, and then the learned judge made use, by way of dictum, of the following language: "A power of sale without limit would doubtless be bad under the Rule against Perpetuities, and a testator will not be presumed to have intended anything so absurd."

On the other hand, there is a greater weight of authority that the dictum of Lord Eldon is to be disregarded, and that such powers are, without assigning any very definite reason, valid. 2 Sugden, Powers (8th ed.) 494; Chance, Powers § 313; Marsden, Perpetuities 241, 242. This learned author says that the doubt created by the dictum of Lord Eldon has been removed. "It is certain that the common powers of sale and exchange have not, in general practice, been expressly restricted, as to their exercise, within the limits of time imposed by the rule." Challis, Real Property (3rd ed.) 194 "It has been said, indeed, that they (such powers), relax the restraint which a common settlement imposes, and that they are mere words of management of estates." Wigram, *V. C.*,

none of them appear to recognize that the real question is as to the time from which the period prescribed by the rule begins to run, and they all approach the subject as if the question was as to the remoteness of the power from the time of its creation. It is in this branch of the law that this unfortunate notion of the remoteness of a power has produced the greatest confusion.

It is necessary, therefore, to examine the question on principle. It is submitted that the period prescribed by the rule runs from the time of the exercise of the power because the power is independent of the accompanying limitations, upon which its exercise or non-exercise has no effect, and, further, because the trustee does not make any limitations under any power derived from the creator of the trust. The only effect of the power is to enable the trustee to make a good legal title, clear of the equitable estate of the *cestui que trust*. The chief distinction between the trustee's power and the other powers we have been discussing is that, in the case of a trustee, there is a sale or a receipt of some other property in exchange, and in all other cases there is a clear gift of a limitation under the powers.

This proposition is new and requires some argument to support it as it will not be readily accepted. Suppose the trustee sells the trust property under the power; what future interest is limited to which the rule can apply, and when is it created? The practical form in which the question arises is in the consideration of the

in Ferrand *v.* Wilson (1845) 4 Hare 344, at 381; Marshall's Estate No. 1 (1890) 138 Pa. 260, 22 Atl. 90, dictum; Cooper's Estate (1892) 150 Pa. 576, 24 Atl. 1057.

Mr. Gray, Rule against Perpetuities (3rd ed.) §§ 482, 488, 490, concludes that such powers are valid because the trusts to which they are attached must come to and end or be destroyed within the limits fixed by the Rule against Perpetuities, that they are unobjectionable because they are destructible, upon which it may be observed, (1) that a trust does not necessarily come to an end within the period fixed by the rule; (2) that the powers are indestructible during the continuance of the trust. Mr. Gray appears to draw no distinction between the powers of a trustee over the legal title and his powers over the equitable title. A case may arise where the trust will not terminate within the period fixed by the Rule against Perpetuities. Thus, where there is a devise to *A* in trust for *B* for life, at his death in trust for the oldest grandchild of *C* then living, for life, and after the grandchild's death, to *X* a living person, and his heirs, with power in the trustee to sell at any time during the continuance of the trust. *B* dies, living a grandchild of *C*. The life estate in this grandchild is good, and the trust must remain until his death. Mr. Gray, Rule against Perpetuities (3rd ed.) § 500, says that the power in such a case is void, because it may be exercised at a remote period. To say that the power is valid because the trust must come to an end within the period fixed by the rule, and then, when faced with a case where the trust continues beyond the period, to say merely that the power is void, does not, it is submitted, meet the difficulties of the case, and comes dangerously near begging the question.

validity of the title offered by the trustee. We shall undertake to show that the rule applies to the limitations made by the trustee under the power, and that the period prescribed by the rule begins to run from the time he exercises it, and not from the time of the creation of the trust.

Can the interest limited by the trustee in disposing of the legal title be said to be created by the settlor of the trust? This point appears to have been assumed by text writers and judges who have discussed the point.[35] They say that the interests are limited by the donor of the trust, and the period, therefore, begins to run from the date of the settlement. It is submitted that the notion is erroneous, that the interests are not created by the donor, and the period begins to run from the time the trustee disposes of the title. We shall consider the question (1) at law, (2) in equity.

1. At law. The owner of the fee at law has, in his own right as *dominus,* sold that fee to another. There was notice of an equitable right in a third party created by an instrument existing in a previous chain of title. That equitable right does not prevent the passing of the title at law. By reason, however, of a particular provision in the instrument, the trustee can dispose of the title free from the claim of the *cestui que trust,* where otherwise he could dispose of it only subject to that claim. The trustee's right to dispose of the title does not spring from the power but from his title as *dominus.* The only effect of the power is to shift the right of the *cestui que trust.* If, therefore, the trustee should in the conveyance limit interests which violate the rule, as he undoubtedly might, the void limitations would not arise under the power. They would be void without the presence of the power.

Are such limitations to be considered as being created by the donor of the trust? The donor has parted with the entire legal title; he has completely exhausted the fee by his limitations. How, therefore, can any further limitations be made by him? The trustee does not act as his attorney or under a common law power. Suppose the trustee sells the trust property to a purchaser for value without notice. Would anyone argue that in such a case the remoteness of an estate limited in that conveyance was to be judged as of the time of the creation of the trust? If the purchaser became affected with notice of the trust after the conveyance, it would

[35] An eminent judge (Sterling, *L. J.,* in Goodier *v.* Edmunds [1893] 3 Ch. 455, at 460) has said that the power offends the rule because it enables the donee of the power to vest in a purchaser an estate in fee simple after the expiration of the prescribed period. This remark assumes the question in dispute, which is, from what date does the period run.

necessarily follow, unless the principle contended for is adopted, that the limitation in the deed under which he had taken might suddenly become void. The application of the Rule against Perpetuities is not an equitable doctrine, and does not depend on notice. How can the circumstance that the purchaser has notice of the trust, but takes discharged thereof because of the power, invalidate on the ground of remoteness a limitation which otherwise would be valid? There is no more room to say, in such a case, that the disposition of the fee or any other interest is a disposition by the settlor of the trust, than there is to say that a limitation by a vendee years after he has acquired title is to be judged as to its remoteness by its distance in time from the date he purchased the title.

2. In equity. In equity, the power operates as to the equitable estate of the *cestui que trust* to shift that estate from one property to another. It is not, therefore, in equity the limitation of a new estate or of any future interest. The trustee is under a duty with respect to a certain piece of property, as to the estate of the *cestui que trust* therein. He, in pursuance of a power, shifts that estate and his duty from that property to another. It is therefore submitted that in equity there is no limitation of an estate or future interest, and there is, therefore, no reason for the rule to apply in equity any more than at law. This argument has been put in this form: that the power does not defeat or destroy estates but only effects a change of title,[36] to which three answers have been offered, (1) that it is an equitable answer to a legal objection.[37] To this it may be replied that there is no legal objection. The limitation at law is a transfer of the fee, and is totally outside the application of the rule. (2) The second answer suggested is, that the exercise of the power may cause an entire change in the nature

[36]2 Sugden, Powers (8th ed.) 494.

[37]Hayes' Introduction to Conveyancing (3rd ed.) 470. The learned author assumes that the power is void at law. In this assumption, it is admitted, lies the fallacy of his position. The power does not exist at law.

"If Blackacre be well sold and conveyed under a power of sale, there must be a destruction of all interest in Blackacre: and when the objection is to the validity of the power over Blackacre, as transgressing a rule of law, it can be no answer to say that the money is liable in equity to be laid out in land, to be settled to the same uses, and that, therefore, Whiteacre may be purchased and substituted, or Blackacre itself may be repurchased and re-settled." Hayes, *op. cit.* 470, n. a.

This is the learned author's answer to Sugden's observation that in the exercise of the power there is merely a change of title and not a destruction of interest.

of the property,[38] as from real estate to personal property or *vice versa,* and may therefore alter the course of descent and the nature of the *cestui que trust*'s interest, and to this it may be replied that it is no concern of the Rule against Perpetuities whether the nature of the property is changed or not. The fact that the settlor has authorized a change is a sufficient answer in the law of trusts. Why, therefore, should it not be to the Rule against Perpetuities?

The third answer suggested is, that the power enables the trustee to create a new equitable estate in the property purchased with the proceeds of the sale. To this it may be replied that the estate or right *in rem.* which the *cestui que trust* has in the new property purchased with the proceeds of the sale, is a right created by law and not a right created by the donor of the trust, and is therefore, not within the scope of the Rule against Perpetuities. That this is so will appear after a moment's reflection. If the trustee mixes the trust funds with his own, or the fund becomes increased, at a remote period, the *cestui que trust* can in each case assert his right, in the one case for reimbursement to all of the trustee's property, and, in the other case, to the increase of the fund. In neither case has the right been created by the donor of the trust. A fresh *res* has been brought within the scope of the trust relation, and when that happens, the *cestui que trust* acquires a right *in rem* as to that *res* by operation of law. Giving this argument its greatest force, it cannot apply to the conveyance of the old trust property made by the trustee, and yet it is to those very limitations that the objection of remoteness is commonly made.

It is submitted, therefore, on principle that in the case of a power in a trustee as to the legal title, the period prescribed by the rule runs from the time of the exercise of the power. There appears to be no case to the contrary.

The nearest approach to what is believed to be the correct view, that such powers are independent of the limitations of the trust, is to be found in the decisions in those jurisdictions in this country which have enacted the Rule against Perpetuities in the (unfortunate) statutory form that the power of alienation may not be suspended for more than two lives in being, &c. Under these decisions the powers of sale in the trustees will not save the trust

[38]Lewis, Perpetuities 547.

if the limitations violate the statute and if the limitations are valid the power may be exercised without reference to them.[39]

If the principle contended for is sound, then it is immaterial that the power may be exercised at a period remote from the creation of the trust. If, however, the period runs from the time of the creation of the trust, then we have the question of whether a power in a trustee as to the legal title exercisable at a remote period may be exercised in time so as to create a valid limitation. The opinion has been expressed that it cannot, that such a power cannot be good in part and bad in part.[40]

(TO BE CONCLUDED.)

ROLAND R. FOULKE.

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[39]Thatcher *v.* St. Andrews Church (1877) 37 Mich. 264, power exercised and title under the same held good. The main question was as to whether the trust contained words conferring a power of sale. Belmont *v.* O'Brien (1855) 12 N. Y. 394, at 405, title good under exercise of the power. Trust apparently for a lawful period. Cruikshank *v.* Home for the Friendless (1889) 113 N. Y. 337, 21 N. E. 64, proceedings to construe a will; Finch, *J.*, said, at p. 352, that the power of sale vested in the trustees does not avoid the statute when the proceeds are held on the same trust as the land. Haynes *v.* Sherman (1889) 117 N. Y. 433, 22 N. E. 938, a power of sale vested in trustees does not suspend the power of alienation, but the power will not save a trust violating the statute from condemnation, dictum. *In re* Tower's Estate (1892) 49 Minn. 371, 52 N. W. 27, in this case the court held that the trust was not invalid because it was lawfully constituted as to the personalty, and as to the lands also not in contravention to the statute for the reason that they are convertible at any time by an authorized sale. Vanderburg, *J.*, at 380, said: "Where the trustee is empowered to sell the land without restriction as to time, the power of alienation is not suspended, although the alienation in fact may be postponed by the non-action of the trustee, or in consequence of a discretion reposed in him by the creator of the trust."

[40]Mr. Gray, Rule against Perpetuities (3rd ed.) §§ 483, 484, says, that the power cannot be partly good and partly bad, and at page 404; that now that ordinary powers in the trustee are unobjectionable there seems to be no sufficient reason for such a departure from the doctrines and analogies of the Rule against Perpetuities as would be involved in sustaining in part powers, the exercise of which might be remote. Proceeding partly on the ground that any period of time can be selected beyond which the power may not be exercised, and therefore, it would be impossible to say what the period is during which the power might be exercised so as to create a valid limitation. It is, however, not difficult; the period prescribed by the rule dating from the time of the creation of the power is sufficiently clear and precise. Lewis, Perpetuities 556; *L. C.* Cottenham in Wood *v.* White (1838) 4 Myl. & C. 480, at 482. Mr. Gray, Rule against Perpetuities (3rd ed.) § 482, commenting on the observation of the Lord Chancellor said: "This idea seems to have sprung from the feeling that the powers of sale and leasing usual in settlements must be supported, and could only be supported in this manner, it not being yet clearly apprehended that such powers were wholly unobjectionable, because destructible." The powers, however, are not destructible so long as the trust can be sustained.

THE CONSTITUTIONALITY OF THE EIGHT-HOUR RAILROAD LAW.

Section one of the Adamson Act[1] provides that "eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employees who are now or may hereafter be employed by any common carrier by railroad (with a few minor exceptions) . . . and who are now or may hereafter be actually engaged in any capacity in the operation of trains" used in interstate commerce. The second section provides for the appointment of a commission of three "which shall observe the operation and effects of the institution of the eight-hour standard workday . . . during a period of not less than six nor more than nine months" and shall report its findings to the President and Congress. The third section forbids pending the report of this commission the reduction of the compensation of the employees' subject to the act below the present standard day's wage, "and for all necessary time in excess of eight hours such employees shall be paid at a rate not less than the pro rata rate for such standard eight-hour workday." The fourth and last section establishes penalties for the violation of any of the provisions of the law.

The constitutionality of this law involves two questions: First, is this type of legislation regulating the employment contract of master and servant in interstate commerce within the commerce power of Congress? Second, is this particular act a reasonable and constitutional exercise of that power?

The first question is easily answered. The power over interstate commerce is "vested in Congress as absolutely as it would be in a single government."[2] Congress has then over interstate commerce the same power that any state has over its intrastate commerce, and the Supreme Court has emphatically said: "We fail to perceive any just reason for holding that Congress is without power to regulate the relation of master and servant, to the extent that regulations adopted by Congress on that subject are solely confined to interstate commerce, and therefore are within the grant to regulate that commerce or within the authority given to use all

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[1]64th Congress 1st Session. H. R. 17700, Passed September 1, 1916.

[2]Lottery Case (1903) 188 U. S. 321, 23 Sup. Ct. 321; Southern Ry. *v.* United States (1911) 222 U. S. 20, 32 Sup. Ct. 2.

means appropriate to the exercise of the powers conferred."[3] The Adamson Law is specifically limited to employees engaged in interstate commerce by words which have met the approval of the Supreme Court. It can therefore be safely said to be within this power of Congress. But though the power of Congress over interstate commerce is plenary, it is still subject to the limitations prescribed in the Constitution.[4] This brings us to the second question.

The Adamson Law seeks to regulate the employment of workmen in interstate commerce. It therefore restricts the right to purchase and sell labor which is a part of the "liberty" protected by the amendments to the federal constitution.[5] "Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."[6] That is to say, the constitutional limitation is not that "no one shall be deprived of liberty", but that "no one shall be deprived of liberty without due process of law". This provision for due process of law has given rise to two lines of cases, those defining due process in legal procedure and those defining due process in legislative enactment. In considering the Eight-Hour Law, we will be concerned with only the second line of cases. Now, for a legislative enactment to be not without due process of law, it must abridge the liberty of the individual in the exercise of some legitimate function of government.[7] We may then consider the Adamson Law legal if passed in exercise of the police power of the federal government, of the power of the government over businesses affected with a public interest, or of the power of a state to amend the charters of the corporation which it creates. If the act can be sustained under any of these governmental functions, it is not a deprivation of liberty without due process of law. If it does not fall within any of these classes, the law is unconstitutional.

The police power of the federal government extends, as has

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[3]First Employers' Liability Cases (1908) 207 U. S. 463 at 495, 28 Sup. Ct. 141.

[4]Gibbons *v.* Ogden (1824) 22 U. S. 1.

[5]This law, being a federal enactment, is subject to the Fifth Amendment, but because of the similarity of the two, the Fourteenth and Fifth Amendments will be cited indiscriminately. Lochner *v.* New York (1905) 198 U. S. 45, 25 Sup. Ct. 539; Muller *v.* Oregon (1908) 208 U. S. 412, 28 Sup. Ct. 324; Riley *v.* Massachusetts (1914) 232 U. S. 671, 34 Sup. Ct. 469.

[6]Crowley *v.* Christensen (1890) 137 U. S. 86, 11 Sup. Ct. 13; Jacobson *v.* Massachusetts (1905) 197 U. S. 11, 25 Sup. Ct. 358; C. B. & Q. R. R. *v.* McGuire (1911) 219 U. S. 549 at 567, 31 Sup. Ct. 259.

[7]C. B. & Q. R. R. *v.* McGuire (1911) 219 U. S. 549, 31 Sup. Ct. 259.

been said to the same limits as does the police power of a state over its domestic affairs. It is in pursuance of this power that most social legislation has been enacted and, in the enactment of this legislation, this power has awakened from the comparative quiescence of a mere order-keeping function of the government into an omnipresent corrective of social ills. It is well recognized now that this police power extends to the protection of health, safety, morals, and general welfare,[8] and some decisions even say to the furtherance of the public convenience.[9] The Adamson Eight-Hour Law is a species of social legislation, and, though a new type, may possibly be justified under this power.

Calling the law an eight-hour law suggests the first line of reasoning which any attempt to uphold it will take. Since the decision of *Holden* v. *Hardy*[10] in 1898, it has been well recognized that the regulation of hours of labor is a legitimate field for legislative activity. Since then, most of the laws passed have been in regulation of the hours of labor of women and children, and it has been finally held that it is within the police power of the State to limit the hours of labor of women to eight hours in all occupations.[11] On similar grounds—for the more delicate structure of women was not stressed as a special ground for the legislative protection in the later case as it was in *Muller* v. *Oregon*[12]—it might well be held that the legislature acting upon ascertained facts, could limit the hours of labor of men in all occupations. But this is debatable ground and it is not necessary to go so far in upholding an eight-hour law for railroad employees. For the hours of labor of men engaged in dangerous occupations[13] or in occupations detrimental to the health of the employees[14] are subject to the regulation of the state. Congress had eight years ago passed a law limiting the hours of labor of certain railroad employees to nine and of all railroad employees to sixteen consecutive hours in one day and, in upholding this law,[15] the Supreme Court, per

[8]See *e. g.* Lochner *v.* New York (1905) 198 U. S. 45, 25 Sup. Ct. 539; Muller *v.* Oregon (1908) 208 U. S. 412, 28 Sup. Ct. 324.

[9]See *e. g.* C. B. & Q. R. R. *v.* Drainage Comrs. (1906) 200 U. S. 561, 26 Sup. Ct. 341; Eubank *v.* City of Richmond (1912) 226 U. S. 137, 33 Sup. Ct. 76.

[10](1898) 169 U. S. 366, 18 Sup. Ct. 383.

[11]Miller *v.* Wilson (1915) 236 U. S. 373, 35 Sup. Ct. 342.

[12](1908) 208 U. S. 412, 28 Sup. Ct. 324.

[13]Holden *v.* Hardy (1898) 169 U. S. 366, 18 Sup. Ct. 383.

[14]Lochner *v.* New York (1905) 198 U. S. 45, 25 Sup. Ct. 539.

[15]Act of Congress March 4, 1907 Ch. 2939, 34 Stat. 1415.

Hughes, J., said: "By virtue of its power to regulate interstate and foreign commerce, Congress may enact laws for the safeguarding of persons and property that are transported in that commerce and of those who are employed in transporting them. . . . Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train dispatchers, telegraphers," etc.[16] That the Adamson Law limits the hours of labor to eight is no argument against its constitutionality, for the legislature is in the first instance the judge of what is necessary for the public welfare, and, granting that the enactment is within its power, the wisdom and the soundness of the economic theory of the laws are matters for the judgment of the legislature only.[17]

The Adamson Law cannot, however, be upheld under this power of the state to regulate hours of labor. If Congress had enacted that eight hours should be a lawful day's work for employees on railroads and that, except in cases of emergency, no employee should work more than eight hours in any one day, the cases just cited would prevent the Supreme Court from exercising its veto upon that law. But the Adamson Law does not do this. It establishes a legal eight-hour working day but does not prohibit the employees from working more than eight hours a day. This takes it entirely out of the class of laws which have been upheld in any cases. These laws were upheld as health measures upon the ground that excessive hours are a strain upon the health of the worker and indirectly a menace to the welfare of the community. If the Adamson Law does not prohibit excessive hours, it can hardly be called a health measure; it can hardly be called an hours of labor law at all for it does not in any way limit the hours of labor. The argument that, in thus establishing a legal day's work and requiring payment for overtime, the law will tend to establish the legal day's work as the maximum day's work and in effect limit the hours of work, in the light of the discussion which preceded the passage of the act must be decided against the realization of this tendency. This, however, is a question of fact and when the law is tested before a court, its advocates may be able to prove

[16]B. & O. R. R. *v.* Int. Com. Com. (1911) 221 U. S. 612, at 618, 31 Sup. Ct. 621.

[17]C. B. & Q. R. R. *v.* McGuire (1911) 219 U. S. 549, 31 Sup. Ct. 259; Erie R. R. *v.* Williams (1914) 233 U. S. 685, 34 Sup. Ct. 761.

that its final effect will be to limit the hours of labor. If so, no doubt the law is constitutional. Until this fact is demonstrated, we must consider the law as establishing a legal day's work only for the purpose of reckoning compensation.

The attempt to uphold the law as an exercise of the police power in regulating wages will result less successfully than that to uphold it as regulating the hours of employment. Indeed the police power has been made little use of in the regulation of wages. Laws requiring the payment of wages every fortnight and in current money have been upheld as measures to prevent fraud.[18] Laws regulating the rate of wages paid by contractors for public work have been passed in exercise of the power to control the expenditures from the public purse. Laws, somewhat like the Adamson bill, establishing a legal day for the purpose of reckoning compensation except when the employer and employee contract otherwise have been enacted rather as laws establishing a rule of evidence than as labor laws. But in analogy to none of these can the Adamson Law be sustained. It establishes a legal day for the purpose of reckoning compensation in all cases and, by the third section forbidding any reduction of wages from the present standard day's wage, it practically attempts to fix the wages of railroad employees absolutely. The nearest approaches to this in previous legislation are the various laws establishing a minimum wage for women. These laws have not yet been passed upon by the Supreme Court; but, if they are upheld, it will be upon the grounds presented in the brief filed by Mr. Brandeis and Miss Goldmark in the minimum wage cases.[19] This brief argues that as low wages are detrimental to the health, morals, and economic welfare of the women, it is to the interest of the community that the women be paid a fair living wage. No such argument can be made in favor of the Adamson Law, for as will be shown later the wages received by the trainmen are well above the economic minimum wage. It cannot therefore be argued that this law establishes a minimum necessary to the health, morals, and economic welfare of railroad employees. Granting, then, for the purpose of argument, that the grounds set forth in the brief will be accepted by the Supreme Court, it yet cannot be argued that the Court in thus extending the police power beyond anything which it has up to now sanctioned will establish any precedent upon which the

[18]Knoxville Iron Co. *v.* Harbison (1901) 183 U. S. 13, 22 Sup. Ct. 1.

[19]Stetler *v.* O'Hara (1914) U. S. Sup. Ct. Oct. Term 507, 508.

Adamson Law can be sustained as an exercise of the police power to regulate wages.

Finally, in view of the occasion of the Adamson Law, it is necessary to examine it as an exercise of the police power for the prevention of strikes. As was said by McKenna, J., in his dissenting opinion in *Adair* v. *United States*[20]—and the opinion of the Court contains nothing contrary to this: "I submit no worthier purpose can engage legislative attention or be the object of legislative action, and it might be urged, to attain which the congressional judgment of means should not be brought under a rigid limitation and condemned, if it contribute in any degree to the end" of preventing strikes and the concomitant disorganization of business. But in spite of this prima facie constitutionality of the legislative enactment, the law must be as has been so often iterated a reasonable means to accomplish the end.[21] The law as to what is a reasonable means to prevent strikes is decidedly meagre. The only Supreme Court case—and the only case I have been able to find—is that of *Adair* v. *United States,* in which it was held that a provision in the general arbitration law which prohibited the arbitrary discharge of a railroad employee because of his membership in a labor union had no reasonable relation to the prevention of strikes. This furnishes us with no analogy as to the Adamson Law; but again an examination of the provisions of this law will lead to a conclusion against rather than for the constitutionality of the law. True, the section ordering the President to appoint an investigating commission does give the act the air of being a legitimate means to prevent a strike and the court might hold that the fixing of wages for six or nine months is a reasonable experiment to ascertain a basis for a lasting industrial peace. But, on the other hand, the *a priori* determination of an industrial question absolutely without investigation smacks too much of arbitrary discrimination. It is too much in the nature of a question judicial in its nature being decided by capricious legislation. If every strike were to be decided by the legislature, too many political questions would enter into the determination of the result to allow it to be impartial and just. Then, though the Adamson Law were expedient and necessary at the time of its passage, this method of settling disputes con-

[20](1908) 208 U. S. 161 at 184, 28 Sup. Ct. 277.

[21]C. B. & Q. R. R. *v.* McGuire (1911) 219 U. S. 549, 31 Sup. Ct. 259

flicts too forcibly with our sense of justice to be considered a reasonable means to secure industrial peace.

It seems, therefore, that the police power presents little basis upon which to sustain the constitutionality of the law. A very liberal interpretation might bring it under the power to limit the hours of labor or to prevent strikes, but this probability is not so great as to stop us from looking further for some more potent arguments. Accordingly, we shall next examine the power of a state over businesses tinged with a public interest.

This power of the government over these quasi public businesses is more extensive than the general police power of the government, but this power too is subject to limitations.[22] If the reasons for this power are understood, its extent and the nature of the limitations upon it will be obvious. These public utilities, as these businesses are called, supply the public with the most necessary commodities, transportation, light and heat, water, grain-storage, and the like. Moreover, "so far as one can see virtual competition is at an end in these industries and virtual monopoly will henceforth prevail. Therefore it must be said that the public has now an interest in the conduct of these businesses by their owners."[23] And this interest of the public demands the regulation of these businesses in just those respects in which the lack of competition is likely to result in the public's injury. As the Supreme Court has so often said: "they are subject to legislative control in all respects necessary to protect the public against danger, injustice, and oppression."[24] It is therefore evident that the right to regulate the transportation by common carriers—and the Adamson Law is a regulation of common carriers—"extends to every phase of the service and to every act of the carrier that affects the service."[25] If all the enactments of Congress regulating interstate railroads are examined, they will be seen to be all in relation to the service of these carriers, either to procure a cheaper or a more efficient service. The Adamson Law is the first attempt to make the service more efficient by increasing the wages of the employees—for we can now frankly consider the law as regulating wages—but this novelty does not condemn it.

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[22]Railroad Commission Cases (1886) 116 U. S. 307, 6 Sup. Ct. 334; see 1 Thompson, Corporations (2nd ed.) §§ 441-448.

[23]1 Wyman, Public Service Corporations § 36.

[24]N. Y. etc. R. R. *v.* Bristol (1894) 151 U. S. 556 at 571, 14 Sup. Ct. 437.

[25]State *v.* Atlantic Coast Line R. R. (1911) 60 Fla. 465, 54 So. 394; Sinking Fund Cases (1878) 99 U. S. 700.

It is, however, again necessary to examine whether the means are a reasonable attempt to attain the end.

Higher wages, it is argued by the economists, conduce to greater efficiency in two directions: they stimulate the employer and they make the employee capable of greater exertions. Considering first the effect of higher wages upon the employee, we must all concede that the well-paid, well-nourished workman is a superior machine to the underpaid, undernourished worker. No one nowadays argues that sweated labor is efficient labor or even cheap labor. If then the Adamson Law was an enactment to guarantee to the trainmen a "fair living wage" for less than which they would not be able to render efficient service in the handling of trains, it would clearly be a reasonable measure to procure efficient service. But the trainmen receive wages well above a fair living wage. Taking the estimate of John Mitchell, president of the United Mine Workers of America, of six hundred dollars as a fair living wage or that of the Massachusetts Commission to Investigate the Cost of Living (1910) of seven hundred and sixty odd dollars, the wages of the trainmen will be found to be far above this standard, for according to figures furnished by the Pennsylvania Railroad, the average wages of its employees are as follows:

	Passenger Service	Freight Service	Yard Service
Engineers	$1843	$1601	$1454
Conductors	1713	1357	1261
Firemen	1066	936	877
Brakemen	986	872	1028

Some economists apparently do not stop with the argument that well-paid workmen are more efficient than underpaid workmen but argue generally that the higher wages a worker is paid, the more efficient he will be.[26] However, though we may agree with these economists as to workers slightly above the margin, it is hard to believe that an increase of ten per cent. in wages of a man who earns from twelve to eighteen hundred dollars will increase his efficiency in any way. Certainly a court could hardly sustain legislation upon such sublimated hypotheses.

The second part of the argument that higher wages cause greater efficiency because of the stimulus to the employer is based

[26] See Seligman, Principles of Economics pp. 288-293; Shadwell, A Comparative Study of Industrial Life in England, Germany and America, Vol. II, pp. 125-130; Carlyle, Wages pp. 29, 75; Adam Smith, Wealth of Nations.

upon that characteristic of human nature to "get one's money's worth". As one eminent authority puts it: "For the increased wages they (the employers) paid, they saw to it that they got more efficient work. Thus the labor was not more expensive to the employer, although the workers received more."[27] Added to this increased efficiency in the handling of the business, there is ample authority to prove that increased wages are an incentive to invention which usually results in more efficient and cheaper production.[28] All in all, this seems to be the best line of argument upon which to uphold the Adamson Law. The Supreme Court, if it follows the argument, will sustain a law upon more problematical grounds based upon less investigation than it usually does; but if logical arguments are presented that this initial increase in wages will result in a more efficient management of the railroads, in a more efficient and expeditious movement of freight, in the invention of better means of transportation, in short, if it can be shown that this initial increase of wages will result in the public's benefit either in cheaper or in more efficient services, the *prima facie* justifiability of legislative action might enable the Court to sustain the law in spite of the hypotheses upon which the argument will be based.

The last power under which a legislative infringement upon the liberty of a citizen may be according to due process of law, the power of a state to amend the charter of a corporation which it has created, will contribute little to upholding the Adamson Law. It will be briefly considered here rather to make this a well-rounded treatment than in the hope of solving the problem. The Adamson Law could of course operate as an amendment of the charters of only the few federal corporations, such as the Union Pacific Railroad, which have been created by Congress; and, since we are treating of the federal power to amend, it will not be necessary to observe whether the charters reserve the right to amend, for the provision in the federal constitution forbidding the impairment of the obligation of contracts does not apply to the federal government.[29] The power to amend confers upon

[27]Sidney Webb in testifying before the National Conference on the Prevention of Destitution (English). Section—Unemployment and Industrial Regulation p. 425.

[28]Sir Thomas Brassey, Work and Wages pp. 13, 74-76; Report from Select Committee on Home Work to House of Commons p. XIV; Report of Chief Inspector of Factories of Victoria (1897) p. 9; also (1901); Adam Smith, Wealth of Nations.

[29]Legal Tender Cases (1872) 79 U. S. 457.

the legislature the power to make any alteration or amendment of a charter subject to it, which will not defeat or substantially impair the object of the grant, or any right vested under the grant, and which the legislature may deem necessary to carry into effect the purpose of the grant, or to protect the rights of the public or of the corporation, its stockholders or creditors, or to promote the due administration of its affairs.[30] So far as legislative enactments do not regulate the methods of the corporation or the relation of the corporation to the state but interfere with purely private matters, such as the employment of labor, as the Adamson Law does, the requirement of the law is that it must be for the benefit of the public.[31] In other words, the same limitations which restricted the police power apply here. It is unnecessary therefore to examine further into the power; we may dismiss it with the statement that it carries us no further than the police power and accordingly furnishes no new grounds for sustaining the Adamson Law.

It seems then that the question of the constitutionality of the Adamson Law should be decided against its validity. We have examined the various functions of the government in exercise of which the law might have been passed but none of them furnishes a sound basis for the legislation. It has been seen that by following finely spun hypotheses, the courts might be able to sustain the law either as an exercise of the police power to regulate hours of labor or perhaps to avert strikes, or as an enercise of the power to regulate public service businesses in furtherance of the efficiency and cheapness of the service, but the subtle speciousness of these arguments is only too apparent. Still, it is possible that the courts, if convinced of the expediency of the law, will uphold it on any of these grounds. But the conclusions of this paper must fail to find any ground upon which they sustain the constitutionality of the law. In addition to this method of proving the unconstitutionality, there is also a positive argument against the law.

The Adamson Law is a social labor law. This type of law is the result of changes in industry brought about by the Industrial Revolution. This period of astoundingly rapid development of mechanical devices in production caused a profound change in

[30]Looker *v.* Maynard (1900) 179 U. S. 46, 21 Sup. Ct. 21.

[31]See 1 Thompson, Corporations §§ 401-415; Sinking Fund Cases (1878) 99 U. S. 700.

the relation of master and servant. Prior to the Industrial Revolution, the business unit had been composed of an employer with two or three employees; after it, with the advent of the factory, one employer employed hundreds and thousands of employees. This resulted in an inequality in the power of bargaining of the two parties to the labor contract. Legislatures recognized the fact "that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority. . . . The fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself."[32] In recognition of this inequality, the legislatures have passed laws guaranteeing to the laborer certain terms of the wage contract. They have guaranteed safe and sanitary places of work, limited hours of work, means and time of payment of wages, sure compensation for industrial accidents, and the courts when these laws have been upheld by them have explicitly or implicitly recognized that they were passed to remedy this inequality. But it cannot be claimed that the Adamson Law was enacted with any such end in view. The railroad employees whom this law affects are organized into the strongest labor unions in the United States. Their labor unions are the employee's answer to the factory system. Comprising, as they do, almost a monopoly of the workmen in this trade, they are able to employ experts to bargain for all their members with the railroad companies which have a monopoly of the jobs. By means of this organization and this collective bargaining, as it is called, the two parties to the labor contract are made equally strong. They are able by higgling and bargaining to settle upon an economically fair labor contract. Congress by the Adamson Law interfered in this bargaining in favor not of the weaker party but in favor of one of two equally competent parties. The law is absolutely without precedent.

MALCOLM H. LAUCHHEIMER.

BALTIMORE, MARYLAND.

[32]Holden *v.* Hardy (1898) 169 U. S. 366 at 397, 18 Sup. Ct. 383.

THE OPINIONS OF MR. JUSTICE HUGHES.

Charles E. Hughes was appointed a Justice of the Supreme Court of the United States by President Taft on April 25, 1910, to succeed Mr. Justice Brewer, deceased. The appointment was confirmed by the Senate on May 2, 1910, and Justice Hughes qualified and took his seat upon the Bench on October 10, 1910. From that time until his resignation on June 10, 1916, he participated in the decision of several thousand cases, and himself wrote about one hundred and fifty opinions, including half a dozen dissenting opinions. Altogether he dissented twenty-three times from the majority of the Court. In several instances no opinion was written, in a larger number the dissenting opinion was written by some other member of the Court, but was concurred in by Justice Hughes.

It is difficult to overestimate the importance of the effect upon the history of the country of this mass of judicial labor. The country was not of course in its formative period. The great principles of constitutional law established by Chief Justice Marshall and his successors had been often reiterated, and it was not necessary for the Court to construct or to review the philosophy of constitutional law or the principles governing the relations between the various departments of the Government and between the States and the Federal Government. The fundamental and underlying theories had been settled and established. The task of the Supreme Court during these later years was rather to clarify these principles and apply them to the intricate problems of modern life. Measured, however, by the immediate effect upon the welfare and safety of the people and upon the property interests of the country, there can be no comparison between the importance of the decisions rendered by Mr. Hughes and his associates and those which were rendered by Chief Justice Marshall in the early days of the Republic. *Marbury* v. *Madison*[1], which has been rightly called "the beginning of the American system of constitutional law," directly concerned only the right to compel the issue of a commission to a Judge for the District of Columbia. In it, of course, was announced the principles governing the right of the Supreme Court to review the constitutionality of acts of co-ordinate branches of the Government. The immediate effect of the decision, however, was small. Consider on the contrary,

[1](1803) 5 U. S. 137.

the tremendous issues involved in the cases which were to come before the Court after October, 1910. The Sherman Anti-Trust Act had not yet been clarified by the decisions in the Standard Oil and Tobacco Company cases relating to aggregations of capital so great in amount as to have been almost unthinkable in the simple days of the early nineteenth century. The Income Tax Law, affecting the income of every person of the country of over $4,000, had not yet been put upon the statute books. The opinion in the Minnesota Rate Cases alone affected the rights of the railroad companies interested in the sum of millions of revenue annually. The opinions in the cases involving the constitutionality of the eight-hour laws and the other laws governing the employment of women and children in industry influenced the fate and welfare of hundreds of thousands of people.

Measured also by the mere number of cases decided and the multiplicity of legal principles settled, there is also no comparison between the work accomplished during the less than six years of service of Justice Hughes on the Supreme Court Bench and the thirty-four years of service of Chief Justice Marshall. The constitutional opinions of the latter during the whole of his long judicial career, and including those rendered upon the Circuit, were only forty-two in number, and he undoubtedly wrote a majority of the constitutional opinions of the Supreme Court during this time. Of approximately one hundred and fifty opinions written by Justice Hughes, by far the greater part of them discussed and decided questions of constitutional law. While these opinions were, of course, participated in by the other able members of the Supreme Court, the credit for them must be given in large part to the writer, and as to some of them it may safely be said that they rank among the most important and able pronouncements upon the principles of constitutional law that have come from the Supreme Court during its entire history. The range of subjects covered by these opinions is very large, and they can be discussed only in very broad and general classes.

1. Miscellaneous Legal Opinions.

While the opinions of the Court involving general propositions of law have by no means the same interest as those involving constitutional questions, yet in view of the magnitude of the property or personal rights involved, such opinions are often worth reviewing. Justice Hughes wrote a considerable num-

ber of these in which important principles of law were discussed or which for other reasons are worthy of attention. They cover questions of admiralty, the rights of Indians, domestic relations, the jurisdiction of the courts, questions of practice and evidence, trusts and restraint of trade, construction of statutes, trademarks, copyright, the customs laws, riparian rights, patents, wills, bankruptcy and the National and State Pure Food Laws, common carriers, the relations of master and servant and a variety of other subjects.[2]

One of the earliest cases in which Justice Hughes, although he did not write the opinion, participated in as a dissenting member of the Court, construes a Statute of the District of Columbia relating to the civil rights of women. The plaintiff in this case brought suit under the statute against her husband in the sum of $70,000 for assault. The statute gave married women the right to engage in business, etc., and to sue separately for torts committed against them as fully and freely as if they were unmarried. The majority opinion held that this statute should not be interpreted to allow a wife to sue her husband, regarding the suit as a dangerous attempt to obtain by construction radical and far-reaching changes in the policy of the common law. Justice Harlan, however, wrote a dissenting opinion which was concurred in by Justice Holmes and Justice Hughes, interpreting the statute more broadly and holding that the effect of

[2]In addition to the cases referred to *infra*, see the following: Henry *v.* Dick Co. (1912) 224 U. S. 1, 32 Sup. Ct. 364; (patents: Hughes dissenting); Newport Bank *v.* Herkimer Bank (1912) 225 U. S. 178, 32 Sup. Ct. 633 (bankruptcy); Santa Fe Ry. *v.* Grant Bros. (1913) 228 U. S. 177, 33 Sup. Ct. 474 (common carriers); George A. Fuller Co. *v.* McCloskey (1913) 228 U. S. 194, 33 Sup. Ct. 471 (master and servant); Donnelly *v.* United States (1913) 228 U. S. 243, 33 Sup. Ct. 449 (evidence; confession of murderer: Hughes dissenting); McCoach *v.* Minehill Ry. (1913) 228 U. S. 295, 33 Sup. Ct. 419 (corporation tax; what constitutes doing business; Hughes dissenting); United States *v.* Citroen (1912) 223 U. S. 407, 32 Sup. Ct. 259 (import duties); Thaddeus Davids Co. *v.* Davids (1914) 233 U. S. 461, 34 Sup. Ct. 648 (trade marks); Schmidt *v.* Bank of Commerce (1914) 234 U. S. 64, 34 Sup. Ct. 730 (negotiable instruments); Selig *v.* Hamilton (1914) 234 U. S. 652, 34 Sup. Ct. 926 (stockholders liability); Robinson *v.* Baltimore & Ohio R. R. (1915) 237 U. S. 84, 35 Sup. Ct. 491 (construction of Employer's Liability Statute); Spokane etc. R. R. *v.* Whitley (1915) 237 U. S. 487, 35 Sup. Ct. 655 (damages; death by wrongful act); Virginia *v.* West Virginia (1915) 238 U. S. 202, 35 Sup. Ct. 795 (evidence; market value etc.); American Lithographic Co. *v.* Werckmeister (1911) 221 U. S. 603, 31 Sup. Ct. 676 (copyright); United States *v.* Johnson (1911) 221 U. S. 488, 31 Sup. Ct. 627 (construction of Pure Food Act. Dissenting opinion by Hughes); Philadelphia Co. *v.* Stimson (1912) 223 U. S. 605, 32 Sup. Ct. 340 (injunction to restrain criminal proceedings; riparian rights); Johnson *v.* Washington Loan & Trust Co. (1912) 224 U. S. 224, 32 Sup. Ct. 421 (wills).

the majority opinion would be to defeat the clearly expressed will of the Legislature by a construction of its words that could not be reconciled with their ordinary meaning.[3]

The other early legal opinions written or participated in by Justice Hughes related largely to questions of practice and evidence, and do not require any comment. In January, 1911, however, there came before the court one of the many phases of the litigation between Dr. Miles Medical Company and Park & Sons Company,[4] which involved questions under the Sherman Act and the common law doctrines of restraint of trade. The complainant, the Dr. Miles Medical Company was a manufacturer of proprietary remedies, which it was accustomed to sell under two kinds of contracts. One was a contract with jobbers and wholesalers by the terms of which the proprietary medicines were consigned to them as agents of the manufacturer for sale. It was provided that title should not pass until the actual sale. The jobber agreed not to sell under an agreed price and only to retail or wholesale agents of the manufacturer. The second form of agreement was one made with retailers, by which they agreed to maintain a schedule of prices and not to sell to wholesale or retail agents not accredited agents of the manufacturer. Suit was brought against the defendant, Park & Sons Company, which was charged with procuring the medicines at cut prices by inducing those who made the contracts to violate the restrictions. The Court held, through an opinion of Justice Hughes, that the plaintiff's system was in restraint of interstate trade or commerce and was invalid, and the important principle was established that the restrictions did not gain validity because they related to proprietary medicines manufactured under a secret process. Justice Hughes said:[5]

"But because there is monopoly of production, it certainly cannot be said that there is no public interest in maintaining freedom of trade with respect to future sales after the article has been placed on the market and the producer has parted with his title."

Justice Holmes, in a vigorous dissenting opinion, argued that no public policy was to be suberserved by invalidating such agreements.[6]

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[3]Thompson *v.* Thompson (1910) 218 U. S. 611, 31 Sup. Ct. 111.

[4]Dr. Miles Medical Co. *v.* Park & Sons Co. (1911) 220 U. S. 373, 31 Sup. Ct. 376.

[5]At p. 403.

[6]At p. 409.

The difference in this case between Justice Hughes and Justice Holmes was undoubtedly partly economic and partly legal, and well illustrates two methods of legal thought. The latter, in an opinion somewhat spiced with humor, took the position that there was no statute covering the case and "no body of precedent that by ineluctable logic" require the conclusion to which the court had come. Therefore, he said, the question is one of public policy, whether on economic or social grounds there is any reason why the court should find that such a plan of price fixing was contrary to the interests of the public. Upon this point he took a decided view in favor of the *laissez faire* doctrine, arguing that "the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear." "I think that we greatly exaggerate," he continued, "the value and importance to the public in competition * * * as fixing a fair price. What really fixes that is the competition of conflicting desires. We none of us can have as much as we want of all the things that we want, therefore, we have to choose. As soon as the price of something that we want goes above the point at which we are willing to give up other things to have that, we cease to buy it and buy something else. Of course I am speaking of things that we can get along without. There may be necessaries that sooner or later must be dealt with like short rations in a shipwreck, but they are not Dr. Miles' medicines. With regard to things like the latter, it seems to me that the point of most profitable returns marks the equilibrium of social desires and determines the fair price in the only sense in which I can find meaning in those words."[7] Justice Holmes, therefore, concluded that there being no reasons of public policy against the contract, the court should uphold and protect it.

Justice Hughes, on the contrary, held in the first place that there was no distinction between a proprietary medicine and any other commodity with respect to the privileges it should be entitled to in this domain of the law after it had entered the channels of commerce. He, therefore, distinguishes the case of a patented article, with reference to which the statute gave special privileges for a definite period. To extend to an unpatented article rights which were expressly given to a patented one for the purpose of stimulating invention would be, he held, to extend to the unpatented article in perpetuity that which a patented

[7]At p. 412.

article obtained under the statute for only a limited time. He controverted also the argument that the secrecy of the process and the monopoly of production that it gave, conferred any additional rights. He said:

"But, because there is monopoly of production it cannot be said that there is no public interest in maintaining freedom of trade with respect to future sales after the article has been placed on the market and the producer has parted with his title."

Justice Hughes had very little occasion to cover in any of his own opinions complicated or delicate questions relating to trademarks, but a case decided in May, 1911, is of such historical interest that it deserves being noted. This was the case of *Baglin* v. *Cusenier Company,*[8] and involved the rights of the Carthusian Monks to their trademarks in the name "Grande Chartreuse," which has been used in connection with the liqueurs or cordial of that name. The opinion reviewed the rather romantic history of the monastery, the expulsion of the Monks from France, their legal contest with the French "Sequestrating Administrator or Liquidator," and upheld as against the latter the claim of the Monks to their trademark.

Justice Hughes also passed upon an interesting question of copyright in the case of *Ferris* v. *Frohman.*[9] This was a suit to restrain the production of a play "The Fatal Card," brought by the assignee of the English authors against an alleged infringer in the United States. The court held that the taking out of a copyright in England, while it thereby substituted a statutory right there for the common law rights of ownership of the play which was lost, did not deprive the plaintiffs of their common law right elsewhere and that the *performance* of the play in England did not cause the plaintiffs to lose their common law right in this country.

In various opinions Justice Hughes passed upon the rights of Indians and the title of Indians to allotted lands. Frequently the case involved the right of the United States to set aside conveyances made by Indians to whom lands had been granted by the United States within the period during which the statutes forbade alienation. The dependent character of the various Indian nations and the right of the United States to protect

[8](1911) 221 U. S. 580, 31 Sup. Ct. 669.

[9](1912) 223 U. S. 424, 32 Sup. Ct. 263.

them by representation in such suits are strongly insisted upon. *Heckman* v. *United States*,[10] was such a case.

On the admiralty side of the court, Justice Hughes passed upon a case involving the question of jurisdiction of the admiralty court for torts, and while strongly intimating that it would be sufficient to confer such jurisdiction that the tort had occurred upon navigable waters, nevertheless held that where an accident occurred to the employee of a stevedore company on a vessel located in navigable waters by reason of the negligent operation of a winch operated from the wharf at which the vessel was lying, such a tort was of a maritime nature and subject to admiralty jurisdiction.[11]

2. Constitutional Opinions.

One of the first opinions written by Justice Hughes upon an important constitutional question concerned the thirteenth amendment relating to involuntary servitude.[12] An Alabama statute provided that any person who with intent to injure or defraud any employer entered into a written contract for service and thereby obtained money for the same and with like intent to defraud left the service without returning the money or performing the service, should be punished as if he had stolen it. The refusal to perform such service or refund such money without just cause was declared by the statute to be *prima facie* evidence of the intent to defraud. Furthermore, under the decisions of Alabama the accused, for the purpose of rebutting the presumption, was not allowed to testify as to his uncommunicated motives or intentions. Bailey, a negro, entered the service of the Riverside Company under a written contract for a year at $12. a month, receiving $15. in advance. He worked a month and three or four days, and then left without refunding the money. Upon this evidence alone, Bailey was convicted and sentenced to pay a fine of $30. and costs, and in default thereof was sentenced to hard labor for thirty days in lieu of the fine and for one hundred and ten days in lieu of costs. The majority

[10](1912) 224 U. S. 413, 32 Sup. Ct. 424. For other Indian cases see the following: Mullen *v.* United States (1912) 224 U. S. 448, 32 Sup. Ct. 494; Goat *v.* United States (1912) 224 U. S. 458, 32 Sup. Ct. 544; United States *v.* Pelican (1914) 232 U. S. 442, 34 Sup. Ct. 396; Reynolds *v.* Fewell (1915) 236 U. S. 58, 35 Sup. Ct. 230; United States *v.* Noble (1915) 237 U. S. 74, 35 Sup. Ct. 532.

[11]Atlantic Transport Co. *v.* Imbroveck (1914) 234 U. S. 52, 34 Sup. Ct. 733.

[12]Bailey *v.* Alabama (1911) 219 U. S. 219, 31 Sup. Ct. 145.

of the Court, through Justice Hughes, held that the statute authorized the jury to convict upon mere proof of breach of contract. "He stood," said Justice Hughes,[13] "stripped by the statute of the presumption of innocence and exposed to conviction of fraud upon evidence only of the breach of contract and failure to pay." While the court recognized the right of a statute to provide that the proof of one fact should be *prima facie* evidence of the main fact in issue where the inference is not purely arbitrary and there is a rational relation between the two facts and the accused is not deprived of proper opportunity to submit all the facts, yet it maintained that the state may not by creating presumptions interfere with matters withdrawn from its authority by the Federal Constitution, or subject an accused to conviction for conduct which it is powerless to proscribe. For these reasons the Court held that the statute violated the thirteenth amendment relating to involuntary servitude. From this opinion Justice Holmes and Justice Lurton dissented.[14]

The case is an interesting one from the human as well as the legal side and it evidently appealed to Justice Hughes' sense of justice and fair play. This more fully appears from the following extract from the opinion. He said:[15]

"Without imputing any actual motive to oppress, we must consider the natural operation of the statute here in question * * * , and it is apparent that it furnishes a convenient instrument for the coercion which the Constitution and the act of Congress forbid; an instrument of compulsion peculiarly effective as against the poor and the ignorant, its most likely victims. There is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based. The provisions designed to secure it would soon become a barren form if it were possible to establish a statutory presumption of this sort and to hold over the heads of laborers the threat of punishment for crime, under the name of fraud but merely upon evidence of failure to work out their debts."

The Court, during Justice Hughes membership, frequently considered questions relating to the validity of state statutes fixing the liability of railroads as employers. The right of the states to pass all reasonable police regulations and laws affecting the public security and welfare were uniformly upheld, and Justice Hughes sustained the constitutionality of such legislation where

[13] At p. 236.
[14] At p. 245.
[15] At pp. 244, 245.

it did not clearly appear that the action of the state was arbitrary. His views upon these questions are very fully stated in the case of the *Chicago, Burlington & Quincy Railroad* v. *McGuire*.[16] A statute of Iowa provided that no contract of insurance relief nor the acceptance of such relief should constitute a defense to any action brought for damages sustained in consequence of the negligent operation of a railway. In an action for personal injuries received through negligence imputable to the railroad company, the railroad company set up as a defense that recovery was barred by the acceptance of benefits under a contract of membership in its relief department. The Court held that the act was not an unwarranted interference with the liberty to make contracts and that it was not a denial of the equal protection of the laws. Justice Hughes said:[17]

"The Legislature, provided it acts within its constitutional authority, is the arbiter of the public policy of the state.

"* * * Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."[18]

Upon the question as to the right of the courts to compel the production of documents in criminal cases, Justice Hughes broadly interpreted such powers as against the right of individuals to withhold alleged incriminating evidence. In the case of *Wilson* v. *United States*,[19] the question arose as to whether a witness was in contempt for refusing to permit the inspection by a grand jury of letter press copy books in his possession. The books belonged to a corporation of which he was president and were required to be produced by a subpœna *duces tecum*. The subpœna was directed to the corporation and was served upon Wilson as president of the company. Wilson, who was under prosecution, claimed that the books were necessary to his defense and that the matters in them would tend to incriminate him. Justice Hughes held that as the books were the books of the corporation, they were subject to the visitatorial power of the State and the Federal Government and that the witness could not resist their production either because they were in his cus-

[16](1911) 219 U. S. 549, 31 Sup. Ct. 259.

[17]At pp. 565, 567.

[18]See also Philadelphia etc R. R. *v.* Schubert (1912) 224 U. S. 603, 32 Sup. Ct. 589.

[19](1911) 221 U. S. 361, 31 Sup. Ct. 538.

tody or because the letters in them were signed by him, if such letters related to the affairs of the corporation.

The clear, cold, incisive reasoning of this opinion offers an interesting comparison with the dissenting opinion of Justice McKenna, in which he almost passionately deprecated in language worth quoting what he felt to be a violation of personal liberty secured by the constitution, premised by a statement that he felt that "a constitutional provision whose purpose is the protection of personal liberty" was involved. "The application of the constitution," he added,[20] "especially as it may affect personal privileges, is the most serious duty of the court. * * * Courts cannot change it or add to it or take from it to suit the 'conditions of modern civilization,' as was suggested in a case submitted with this. It is as vital now as when ordained, and is not uncertain. * * * A limitation by construction of any of the constitutional securities for personal liberty is to be deprecated. A people may grow careless and overlook at what cost and through what travail they acquired even the least of their liberties. The process of deterioration is simple. It may even be conceived to be an advancement, and that intelligent self government can be trusted to adapt itself to occasion, not needing the fetters of a predetermined rule. It may even be considered that a constitution is the cradle of infancy, that a nation grown up may boldly advance in confident security against the abuses of power and that passion will not sway more than reason. But what of the end, when the lessons of history are ignored, when the barriers enacted by wisdom gathered from experience are weakened or destroyed? And weakened or destroyed they may be when interest and desire feel their restraint. What then of the end; will history repeat itself? And this is not a cry of alarm. 'Obsta principiis' was the warning of Mr. Justice Bradley. * * * I repeat the warning."

A large class of cases also concern the validity of statutes providing for the health and safety of employees, and limiting their hours of labor. Here also the police powers of the State Legislature and of Congress have been broadly interpreted. The earliest case of this nature in which Justice Hughes wrote the opinion, was that of *Baltimore & Ohio Railroad* v. *The Interstate Commerce Commission*,[21] decided on May 29th, 1911. A

[20] At pp. 386, 393, 394.

[21] (1911) 221 U. S. 612, 31 Sup. Ct. 621.

bill in equity was brought to annul an order of the Commission requiring railroads to make monthly statements showing instances where employees subject to that act entitled "An act to promote the safety of employees, &c.," had been on duty for a longer period than that allowed. The Court upheld the constitutionality of this statute, and Justice Hughes said:[22]

"Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider and to endeavor to reduce the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train despatchers, telegraphers and other persons embraced within the class defined by the Act. And in imposing restrictions having reasonable relation to this end there is no interference with liberty of contract as guaranteed by the Constitution."

The Court likewise held in *Miller* v. *Wilson*[23] that an eight-hour-day law for women passed by a state legislature was not an unlawful restraint upon the liberty of contract as applied to a chambermaid in a hotel, and that the exclusion of boarding and lodging houses did not amount to an arbitrary and unconstitutional classification. The constitutionality of the same statute was also upheld so far as it applied to student nurses and a woman pharmacist, and other employees in a private hospital, although graduate nurses were excepted from the operation of the statute.[24]

The constitutional rights of persons indicted for crime have been considered in a number of opinions, among which is the case of *Graham* v. *West Virginia*.[25] Justice Hughes held that a provision of the code of West Virginia to the effect that if a convict had been twice before convicted for the same offense this fact might be determined upon information, and if found against him, an additional penalty might be imposed, was not unconstitutional. He discussed the history of such statutes and found that the defendant would not by their operation be deprived of due process of law, nor the equal protection of the laws. When, however, the famous Frank case[26] was before the Court upon the question as to whether a writ of habeas corpus

[22] At p. 619.
[23] (1915) 236 U. S. 373, 35 Sup. Ct. 342.
[24] Bosley *v.* McLaughlin (1915) 236 U. S. 385, 35 Sup. Ct. 345.
[25] (1912) 224 U. S. 616, 32 Sup. Ct. 583.
[26] Frank *v.* Mangum (1915) 237 U. S. 309, 345, 35 Sup. Ct. 582.

should be issued because Frank had been deprived of his liberty without due process of law, Justice Hughes united with Justice Holmes in a dissenting opinion, very strongly maintaining the right of the Supreme Court under the facts disclosed to review in habeas corpus proceedings the trial in the State Court. Justice Holmes in his opinion relied upon the fact that according to the showing in the petition asking for the writ, the jury was plainly overawed by the mob feeling alleged to have prevailed at the time and held that a hearing should be given in spite of the fact that the State Court had previously decided that the prisoner had not been deprived of a trial by due process of law.

Upon the principle that the states in the valid exercise of the police power might pass laws relating to the safety and welfare of its people and that the discretion of the state legislature would not be overruled unless it was clearly arbitrary in its exercise, Justice Hughes in several opinions upheld laws relating to the inspection of foods and the prohibition of the sale of foods deemed by the Legislature to be injurious. Such a case was that of *Price* v. *Illinois*,[27] in which it was held that a state statute forbidding the sale of a food preservative containing boric acid was not invalid as taking property without due process of law or as being a denial of the equal protection of the laws where it was shown that the question as to the harmful character of boric acid is at least debatable.

An interesting class of cases also arose in which the constitutional provision relating to the equal protection of the laws was invoked. One of these concerned the familiar regulations of the railroads in certain states providing for separate sleeping cars, Pullman chair, and dining cars for negroes and whites. Justice Hughes in the case of *McCabe* v. *Atchison, Topeka & Santa Fe Railway*[28] followed the already existing line of decisions of the Supreme Court in upholding this practice in Oklahoma. It was alleged in this case, however, that as a matter of fact, no separate sleeping cars, Pullman chair or dining cars were actually furnished for negroes and the railroad company urged that they were excused from furnishing them because there was not sufficient demand upon the part of the negroes to justify it. Justice Hughes, however, held that this contention was without merit, since it made the constitutional right "depend upon

[27](1915) 238 U. S. 446, 35 Sup. Ct. 892; see also Savage *v.* Jones (1912) 225 U. S. 501, 32 Sup. Ct. 715.

[28](1914) 235 U. S. 151, 35 Sup. Ct. 69.

the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one." Another case of this same class was that of *Truax* v. *Raich*,[29] where the Court considered the validity of a statute of Arizona making it a misdemeanor to employ not less than 80% qualified electors or native born citizens of the United States in any industry in which more than five persons were employed. Justice Hughes held that the plaintiff, a native of Austria, but a resident of Arizona, was entitled under the 14th amendment to the equal protection of the laws, and that this legislation was not within the principle that the state has power to make reasonable classifications in legislation, to promote the health, safety, morals, and welfare of those within its jurisdiction. "This admitted authority,"[30] he said, "with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the State to deny to lawful inhabitants because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community are the very essence of the personal freedom and opportunity that it was the purpose of the amendment to secure. If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words."

By far the most important cases, the opinions of which were written by Justice Hughes, and the ones in which he rendered to American constitutional law the greatest service, are those involving the relative powers of the states and the federal government over intrastate and interstate commerce, and the questions relating to the rights of the states to regulate rates imposed by public service corporations. The whole question was thoroughly reviewed and ably treated in the so-called rate cases, the most important of which are the Minnesota Rate Cases.[31] These cases involved the validity of the orders of the railroad and warehouse commission and the legislative acts of the State of Minnesota prescribing maximum rates for freight and a maximum fare of two cents a mile for passengers. The rates related to traffic exclusively between points within the state. It was contended, however, that as applied to cities on the state's boundary

[29](1915) 239 U. S. 33, 36 Sup. Ct. 7.
[30]At p. 41.
[31](1913) 230 U. S. 352, 33 Sup. Ct. 729.

or to places within competitive districts crossing the state line, the rates disturbed the relations previously existing between interstate and intrastate rates, thus imposing a direct burden upon interstate commerce and creating discriminations as against localities in other states. The rates were also assailed as confiscatory. The Supreme Court, however, sustained the rates as to the Northern Pacific and Great Northern companies, but in the case of Minneapolis and St. Louis Railroad Company the rates were held to be confiscatory in view of the particular facts shown with respect to that road.

The principles laid down by Justice Hughes were these,—that a state has the power to establish rates, if not confiscatory, for railroads within its borders; that such rates are valid though they indirectly affect interstate commerce; that they need not be equal to or greater than those established for interstate commerce; that the legislature has a great range of discretion in the fixing of rates and that they are not to be overturned unless it clearly appears that the legislature has overstepped the bounds. It is not contended that these views are particularly novel, although the Minnesota Rate Cases were among the first, and certainly the most important in which the objection was forcibly pressed upon the court, and clearly considered by it, that the action of the state legislature, though relating ostensibly to intrastate rates only, disturbed the relation previously existing between interstate and intrastate rates and were for that reason invalid.[32]

Although the court in the rate cases upheld the rates fixed by the state authorities because they only incidentally affected interstate commerce, it soon left no doubt that where there was any real conflict between the action of the state and the federal government, the power of Congress was paramount. In *Houston & Texas Railroad* v. *United States*,[33] an order of the Interstate Commerce Commission as to rates was upheld. The holding of the Commerce Court was that the order relieved the railroad company from further obligation to observe the intrastate rates and that it was at liberty to comply with the requirements of the

[32]See also Missouri Rate Cases (1913) 230 U. S. 474, 33 Sup. Ct. 975; Louisville & Nashville R. R. *v.* Garrett (1913) 231 U. S. 298, 34 Sup. Ct. 48; and as to conflicting rights of states and Congress over interstate and intrastate commerce, see Chicago, Mil. & St. P. R. R. *v.* Iowa (1914). 233 U. S. 334, 34 Sup. Ct. 592; Adams Express Co. *v.* New York (1914) 232 U. S. 14, 34 Sup. Ct. 203; Atlantic Coast Line R. R. *v.* Georgia (1914) 234 U. S. 280, 34 Sup. Ct. 829.

[33](1914) 234 U. S. 342, 34 Sup. Ct. 833.

Commission by increasing these rates sufficiently to remove any forbidden discrimination. Justice Hughes upheld this order of the Commission and declared that Congress was competent to control the intrastate charges of an interstate carrier to the extent necessary to prevent injurious discrimination against interstate traffic.

The Court also proved that it would not hesitate to grant an injunction against rates established under state authority that were clearly shown to be confiscatory. In *Northern Pacific Railway* v. *North Dakota*,[34] upon a showing that the rates imposed by the state for a certain kind of traffic would yield the railroad company little or nothing, Justice Hughes held that the enforcement of such rates should be restrained.

Interesting questions as to the constitutional right to liberty and property were discussed and passed upon in the case of *St. Benedict Order* v. *Steinhauser*,[35] in which the Court upheld the validity of a rule of the order of St. Benedict making all individual property of the members of the order community property.

In *Coppage* v. *Kansas*,[36] the court found against the validity of a state statute which assumed to prevent any employer from imposing as a condition of a contract of employment that the employee should sign an agreement not to belong to a union. The majority opinion was written by Justice Pitney, who considered that the court was controlled by the decision in the case of *Adair* v. *United States*.[37] The latter case held that a statute which made it illegal for an employer to discharge an employee because he was a member of a union was unconstitutional in that it was in violation of the principle of freedom of contract and the majority of the Court in *Coppage* v. *Kansas* felt there could be no distinction between the two cases. Justice Hughes, however, joined in a dissenting opinion written by Justice Day. Irrespective of the merits of the legislation as an original question, the dissenting opinion held, it was within the province of the legislature to pass it. "The right to join labor unions," the opinion continued,[38] "is undisputed, and has been the subject of frequent affirmation in judicial opinions. Acting within their legal rights, such associations are as legitimate as any organization of citizens formed

[34](1915) 236 U. S. 585, 35 Sup. Ct. 429.
[35](1914) 234 U. S. 640, 34 Sup. Ct. 932.
[36](1915) 236 U. S. 1, 35 Sup. Ct. 240.
[37](1908) 208 U. S. 161, 28 Sup. Ct. 277.
[38]At pp. 32, 33.

to promote their common interest. They are organized under the laws of many states, by virtue of express statutes passed for that purpose, and, being legal, and acting within their constitutional rights, the right to join them, as against coercive action to the contrary, may be the legitimate subject of protection in the exercise of the police authority of the States. This statute passed in the exercise of that particular authority called the police power, the limitations of which no court has yet undertaken to define, has for its avowed purpose the protection of the exercise of a legal right, by preventing an employer from depriving the employee of it as a condition of obtaining employment. I see no reason why a State may not, if it chooses, protect this right, as well as other legal rights." This opinion should be considered in connection with the opinions relating to the constitutionality of statutes limiting hours of labor for women, such as *Miller* v. *Wilson*,[39] and those requiring the installation of safety devices, such as *Baltimore & Ohio Railroad* v. *Interstate Commerce Commission*,[40] and with the opinion in *Truax* v. *Raich*,[41] holding unconstitutional a statute compelling the employment of a certain proportion of native or naturalized citizens. These cases taken in connection with others in which he wrote the opinion, throw an interesting light upon Mr. Hughes labor views.[42]

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[39]See note 23 *ante*.

[40]See note 21 *ante*.

[41]See note 29 *ante*.

[42]For other important constitutional and federal law opinions see the following: Ill. Cent. R. R. *v.* Kentucky (1910) 218 U. S. 551, 31 Sup. Ct. 95 (validity of tax assessment); Matter of Gregory (1911) 219 U. S. 210, 31 Sup. Ct. 143 (validity of statute prohibiting gift enterprises); Toyota *v.* Hawaii (1912) 226 U. S. 184, 33 Sup. Ct. 47 (validity of License Tax); Fraternal Mystic Circle *v.* Snyder (1913) 227 U. S. 497, 33 Sup. Ct. 292 (enforcement of penalty for failure to pay insurance policy); Bacon *v.* Illinois (1913) 227 U. S. 504, 33 Sup. Ct. 299 (Interstate Commerce); Slocum *v.* New York Life Ins. Co. (1913) 228 U. S. 364, 400, 33 Sup. Ct. 523, 537 (Seventh Amendment; Hughes dissenting); Owensboro *v.* Cumberland Tel. Co. (1913) 230 U. S. 58, 76, 33 Sup. Ct. 988, 995 (right to terminate franchise; Hughes dissenting); Clement Nat. Bank *v.* Vermont (1913) 231 U. S. 120, 34 Sup. Ct. 31 (tax on deposits in National Banks); Eastern Extension Tel. Co. *v.* United States (1913) 231 U. S. 326, 34 Sup. Ct. 57 (jurisdiction of Court of Claims); Chicago, Mil. & St. P. Ry. *v.* Minneapolis (1914) 232 U. S. 430, 34 Sup. Ct. 400 (compelling railway to build bridge without compensation); Russell *v.* Sebastian (1914) 233 U. S. 195, 34 Sup. Ct. 517 (right to revoke franchise); Union Line Co. *v.* Railway (1914) 233 U. S. 211, 34 Sup. Ct. 522 (Public Use); Holden Co. *v.* Interstate Trading Co. (1914) 233 U. S. 536, 34 Sup. Ct. 553 (jurisdiction of Federal Court); Los Angeles Switching Case (1914) 234 U. S. 294, 34 Sup. Ct. 814 (Interstate Commerce); Collins *v.* Kentucky (1914) 234 U. S. 634, 34 Sup. Ct. 924 (Due Process of Law); New York Elec. Lines *v.* Empire City Subway (1914) 235

At this time of political stress and of attack and defense of Mr. Hughes as a candidate it is not unprofitable to consider what the opinions which have been referred to can tell us of the man, of his method of thought and expression and his social and political theories. Such a consideration must be premised with the assertion that one will not find in these opinions impassioned discussions of political or social subjects, even to the extent that a judge may properly at times indulge in them. Without the slightest criticism of any of the judges concerned, it may fairly be said that a very minute examination of the opinions of Justice Hughes will fail to disclose any expression of his own personal economic views as positive as those indicated by Justice Holmes in his dissenting opinion, quoted above, in the case of *Dr. Miles Medical Co.* v. *Park & Sons Co.*,[43] or any feeling that the constitution itself needs to be sacredly guarded against the encroachments of modern civilization, as such feeling is expressed in the words of Justice McKenna in the case of *Wilson* v. *United States*,[44] which has also been referred to above.

There can be no doubt, however, that the economic views of Mr. Hughes are as well defined as those of Justice Holmes, and that his regard for the constitution is as deep as that of Justice McKenna. It is simply that the method of judicial expression of the three men differs,—two of them choosing to employ a style somewhat more personal, possibly to the lay reader more interesting, more self revealing,—the other more singly intent upon the legal principles involved. This does not mean, however, that the deep underlying principles of the man have not been unmistakably present in and cannot be deduced from his opinions. The explanation has to be made, however, because it will indicate why the discussion of his judicial views have had to be illuminated, not so much by quoting, verbatim, chapter and verse from the language of his opinions as by an analysis of some of the decisions themselves. The concentration upon the business in hand that these opinions exhibit, the suppression of personality, the lack of rhetorical devices of any kind, make them models of judicial expression. In all the one hundred and fifty opinions that he

U. S. 179, 35 Sup. Ct 72 (franchises; abandonment); United States *v.* Hvosleff (1915) 237 U. S. 1, 35 Sup. Ct. 459 (tax on exports); New York & Norfolk R. R. *v.* Peninsula Exchange (1916) 240 U. S. 34, 36 Sup. Ct. 230 (Carmack Amendment); Jones Nat. Bank *v.* Yates (1916) 240 U. S. 541, 36 Sup. Ct. 429 (liability of directors of National Bank).

[43]220 U. S. 373, at p. 409.

[44]See note 20 *ante*.

wrote in about six years of judicial service extending up to June 10, 1916, five days before his resignation,[45] and long after the suggestion of his nomination had been made, there is not one word indicating an intent to make a political record for himself, —though he had sufficient opportunity,—but only the orderly, impersonal and impartial discussions of the principles underlying the cases coming before him.

What then are the views of Mr. Hughes as they may be deduced from the foregoing opinions? At the present time, perhaps, the most vital topic is his relation towards labor, especially in view of the criticisms that have been voiced in certain quarters on account of his participation in some of the decisions of the Supreme Court. The basis of these criticisms seems to be that the decisions in question are "unfavorable" to labor and the decision of the court in the Danbury Hatters case[46] is pointed to as establishing this. One may look in vain, however, through the opinions written by Justice Hughes to find any indication that he "favors" one class of the community or another. By his oath and the traditions of our judiciary, he was bound "to administer justice without respect to persons, and to do equal right to the poor and to the rich", and "to faithfully and impartially discharge and perform all the duties incumbent upon" him as a Justice of said court, "according to the best of his abilities and understanding, agreeably to the constitution and laws of the United States." Such an obligation leaves no room for "favoritism".

Neither is it fair to judge his individual theories regarding labor and capital too strictly from the majority opinions in which he participated. Though he may have coincided in the general result, it by no means follows that he would endorse every method of expression or even necessarily the spirit, which pervades the opinion.

So far, however, as the opinions actually written by a judge are concerned, it is proper and pertinent to inquire, inasmuch as the law is a living science, whether they show him to be alive to the great social and political movements of the time, and to have interpreted the rules of the constitution and the legislation that has come before him in accordance with the experience of today and the spirit of the times. Have the opinions of the judge been

[45]The last constitutional opinion written by Justice Hughes was in the case of St. Louis & Kansas City Land Co. *v.* Kansas City (1916) 241 U. S. 419, 36 Sup. Ct. 647.

[46]Lawlor *v.* Loewe (1914) 235 U. S. 522, 35 Sup. Ct. 170.

forward-looking or have they been reactionary? Has the judicial mind been, in the words of Mr. Roosevelt, "fossilized", declining to allow the betterment of social conditions on the ground that to do so would interfere with an outworn theory of "liberty"? "The life of the law" declared Justice Holmes in his treatise on "The Common Law", written as early as 1881, "has not been logic, it has been experience. The felt necessities of the times, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed". It should be fair then to examine the opinions of a judge to see "what moral and political theories" have influenced him, and to what "intuitions of public policy" he has been susceptible.

Looking, then, at the opinions of Justice Hughes from this point of view, we find that on the great questions affecting labor, he has at no time been a reactionary, but that he has viewed such problems with a broad and sane sympathy. He has recognized the needs of safeguarding the health, safety and general welfare of laboring men and that these are proper subjects for legislative action. The validity of safety appliance laws and laws fixing the hours of labor has uniformly been sustained in the decisions in which he has written the opinion. On the other hand, in *Bailey* v. *Alabama*,[47] he denied the right of the legislature to pass legislation deemed oppressive to labor. He has recognized the right of labor to unite in labor unions and in the dissenting opinion in which he joined with Justice Day in the case of *Coppage* v. *Kansas*,[48] he held that this right might under the constitution, be protected by legislation from interference at the hands of the employer. That this opinion was reached, however, out of no spirit of undue "favoritism" to labor is sufficiently shown by the case of *Truax* v. *Raich*,[49] in which he upheld the rights of alien labor rightfully residing in this country against oppressive legislation framed for the benefit of "qualified electors". The decisions indicate that his views were based upon grounds of humanity, rather than expediency.

Upon the trust question, his views seem to tend rather to

[47]See note 12 *ante*.

[48]See note 36 *ante*.

[49]See note 29 *ante*.

the strict limitation of monopoly and the giving of free scope to competition wherever it is practicable, and against the *laissez faire* economic theory of Justice Holmes. This is indicated in the case of *Dr. Miles Medical Company* v. *Park & Sons*[50] and his dissenting opinion in *Henry* v. *Dick Co.*[51]

Upon questions relating to evidence we find that he has taken a broad practical view, and has shown an inclination to break away from technical rules in cases where he has not been bound to them by precedent too strong to be broken. His impatience with wrong doing, doubtless, made him particularly intolerant of technical devices in the shape of rules of evidence designed to protect the criminal, as is indicated in *Wilson* v. *United States.*[52]

While it may perhaps be said that no particularly novel principles of law were established in any of the opinions of Justice Hughes, yet he unquestionably performed a real service in clarifying, as he undoubtedly did, the vexed problems arising out of the control by Congress and the States of the complicated web of intrastate and interstate commerce. His marked capacity for analysis of facts and the lucidity of his statement of them, as well as of the governing principles involved, leave this branch of the law in a condition where he who runs may read. Furthermore, in his decisions with regard to rates, he has left unmistakably definite the nature of the evidence that public service corporations must produce if they are to succeed in overturning charges fixed for them by the proper state or federal authorities, while at the same time, he has maintained that rates really shown to be confiscatory will not be upheld by whatever authority imposed. Upon such decisions his fame as a judge will safely rest.

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[50]See note 4 *ante.*
[51]See note 2 *ante.*
[52]See note 19 *ante.*

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NOTES.

SEQUESTRATION OF PRIZES IN NEUTRAL PORTS.—On the 15th of January, 1916, the British steamship *Appam* was captured by the German cruiser *Moewe*. Although twice as far from the United States as from Germany, the *Appam* was brought into Hampton Roads. Application by the prize master to the State Department for internment of the prize was denied. Subsequently, a libel was filed by British claimants, declaring that the coming in as well as the insistence on the right of asylum was a violation of the neutrality of the United States entitling the owners to restitution. The Treaty of 1799 with Prussia[1] provided that vessels of war of both parties shall carry (*conduire*) freely wheresoever they please the vessels and effects taken from their enemies without being subject to legal process. But the court decided that, as the *Appam* was not conducted in by a vessel of war, the treaty did not apply, and accordingly decreed restitution on general principles of international law.[2]

Secretary Lansing held that the Treaty of 1799 was quite evidently only intended to cover the temporary keeping of prizes in our

[1]8 Stat. 172.

[2]The Appam (D. C., E. D. Va. 1916) 234 Fed. 389.

ports, and that this was shown clearly by the provision in the treaty that the vessels "may be freely carried out again at any time by their captors (*le vaisseau preneur*) to the places expressed in their commissions".[3] As the prize master on the *Appam* applied for internment and there was not a sufficient crew on board the vessel to take it out, Germany could not possibly comply with the terms of the Treaty.

Assuming that Secretary Lansing's position is right, the question then is, what are the rights of the *Appam* under general international law? It will be found on examining the authorities that there has been a distinct and sharply drawn line between the English doctrine and that of the other maritime countries.[4] It is to the great advantage of England to have sequestration of prizes in neutral ports forbidden under international law. Her colonial possessions make it comparatively easy for English cruisers to bring prizes into a port of the Empire, while France and Germany would either have to destroy prizes or run the risk of recapture if the capture were made in a locality remote from their coasts.[5] Accordingly, we find that England voted quite readily for Articles 21 and 22 of the 13th Hague Convention of 1907, which prohibited temporary asylum for prizes unless they were in distress, while her envoy, Sir Ernest Satow, made tremendous efforts for the suppression of Article 23, which allowed neutrals to admit prizes for the purpose of sequestration pending condemnation in a prize court of the captor.[6] The general rule seems to be that in the absence of any declaration to the contrary, belligerents may presume that they have a right to bring their prizes into the ports of a neutral for sequestration.[7]

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[3]*Cf.* Robert Lansing, Sec. of State, to Count Von Bernstoff, German Ambassador, March 2nd, 1916.

[4]The English doctrine is represented by The Queen *v.* The Chesapeake (Nova Scotia 1864) 1 Oldright 797; Higgins, Hague Peace Conferences, 483; 2 Op. Atty. Gen. 86 (1828); 2 Westlake, International Law, 242; Wheaton, Elements of Int. Law (5th English ed. by Coleman Phillipson) 695; Risley, Law of War, 176; Hall, International Law (4th ed.) 642. The opposite doctrine is illustrated by 1 Hautefeuille, Des Droits et des Devoirs des Nations Neutres (3rd ed.) 351 *et seq.;* C. Dupuis, Droit de La Guerre Maritime, § 326; *cf.* Bonfils, Droit International Public, § 1469; Bluntschli, Droit International Codifié, 357. The practice of condemning property as prize while lying in a neutral port has been almost universally upheld. The Arabella and Madeira (U. S. C. C. 1815) 2 Gall. 367; 3 Phillimore, International Law, § 379; *cf.* The Henrick and Maria (1799) 4 C. Rob. 43; 2 Halleck, International Law, 436; *contra, cf.* Wheaton, Captures, 261.

[5]C. Dupuis, Droit de La Guerre Maritime, § 287.

[6]Great Britain and Japan were the principal powers voting against the adoption of Article 23 in committee. The United States abstained from voting. The United States, Great Britain, and Japan reserved the article in signing the convention. Higgins, Hague Peace Conferences, 479; 2 Westlake, International Law, 242; 2 Am. Jour. of Int. Law, 524 *et seq.*; C. Dupuis, Droit de La Guerre Maritime, 287. This convention was not to become law between a belligerent and a neutral unless both belligerents had signed the convention. 13th Hague Convention of 1907, Art. 28.

[7]2 Halleck, 169, § 10; 1 Hautefeuille, Des Droits et des Devoirs des Nations Neutres (3rd ed.) 351; Bonfils, Droit International Public, § 1469; Mr. Wheaton to Mr. Upshur, Sec. of State, November 10th, 1843; 7 Moore, Digest, § 1314; 2 Pitt Cobbett, Leading Cases on Int. Law (3rd ed.) 359; 7 Op. Atty. Gen. 122, 129 (1855); *cf.* Deutsche Prisenordnung § 111.

Our position on this question has not, unfortunately, been uniformly on one side or the other. In the latter part of the 18th and first part of the 19th centuries, we went as far as to allow countries under treaty to sell their prizes in our ports even before condemnation.[8] Between that time and the Hague Convention of 1907, we sometimes allowed prizes to be brought in without decreeing restitution,[9] but on one occasion declared in absolutely unqualified terms that we would not admit them.[10] Has our reservation of the 23rd Article of the 13th Hague Convention of 1907 committed us to any definite stand on the subject and declared that we will not receive prizes of the belligerents in our ports for sequestration while in a state of neutrality? On the answer to this question, assuming our hypothesis to be true, depends the solution of the *Appam* Case. That this may not be a definite declaration of our attitude is shown by our refusal to sign the Declaration of Paris, which abolished privateering, because no exemption from capture of private property at sea was granted. Since the Declaration of Paris, however, we have never used privateers and have declared our intention not to do so.[11] It would seem then that this is not a sufficiently definite statement of our attitude to overrule the presumption that prizes will be admitted.

It is decidedly to our interest to be allowed to sequester our prizes in neutral ports, as is shown by the case of the *Bergen* Prizes.[12] This rule if adopted would be a contribution to world peace in tending to prevent the race for naval stations. The argument on the other side of the question, that the neutral would be supplying a naval base for one belligerent, causing resultant friction with the other, is answered by the fact that the second belligerent has no cause for objecting to a right granted under the rules of international law. The provisions of the 23rd Article of the 13th Hague Convention allowing sequestration of prizes in neutral ports certainly equalize the situation of the belligerents. As the delegations backing its adoption urged, it would tend to prevent the destruction of prizes, thus lessening to a great extent the damages to world commerce which result from the sinking of merchant vessels.[13]

If the ruling of Secretary Lansing that the Treaty of 1799[14] does not apply to cases of indefinite asylum is not correct, the *Appam* certainly should not have been restored to the British claimant. The distinction mentioned in the opinion of the court between prizes convoyed in and coming in alone is certainly viduous, and has never been recognized. On the contrary, cases arising under Section 17 of the

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[8]See Consul of Spain *v.* Consul of Great Britain (C. C. 1808) 6 Fed. Cas. No. 3138.

[9]*Cf.* the case of the Sitka, a Russian prize brought into San Francisco harbor by the British cruiser President. 7 Op. Atty. Gen. 122 (1855); Reid *v.* The Vere (D. C. 1795) 20 Fed. Cas. No. 11, 670; *cf.* Moore, Digest, § 1302; 1 Op. Atty. Gen. 78 (1797); but see Stockton, International Law, 408.

[10]7 Moore, Digest, 938.

[11]Stockton, International Law, 48.

[12]5 Moore, International Arbitrations, 4572; 7 Moore, Digest, § 1314.

[13]C. Dupuis, Droit de La Guerre Maritime, § 325; *cf.* Taylor, International Public Law, 581; 2 Am. Jour. of Int. Law, 524.

[14]8 Stat. 172.

French Treaty of 1778,[15] which is substantially the same as the 19th Section of the Prussian Treaty of 1799,[16] have been treated similarly under both situations.[17] As the Treaty with Prussia is not contrary to international law and does not seem to violate any settled policy of our municipal law, it certainly should be upheld instead of being construed so strictly as to divest it of all force. By its provisions, the 13th Hague Convention of 1907 does not impair any of the existing treaty rights between nations,[18] and consequently has no effect to repeal the Treaty of 1799. In whatever light the case is viewed, the opinion of the court seems most unfortunate.

Effect of War on Contracts Between Enemy Belligerents.—The basic doctrine which underlies all adjudications on the effect of war on contracts between enemy belligerents[1] is that all intercourse with the enemy which in any way aids him is illegal.[2] In some cases this prohibition has been held to extend to every kind of intercourse whatsoever;[3] while other courts, reasoning from the premise that the modern tendency is to lessen, as far as possible, the shock which war gives to the social and economic systems of the world, have reached the conclusion that it is only commercial trading, and not all intercourse, which is interdicted.[4] While some difficulty may be experienced in drawing the line, the greater desirability of the latter view, from a humane and progressive standpoint, seems hardly open to question.

A discussion of the practical application of this principle must necessarily be divided into two parts, according to whether the contract under consideration was made during or before the war. In regard to the first class, the general rule is that contracts made with an enemy belligerent, during the progress of a war, are absolutely void.[5] The State may license such contracts;[6] but otherwise the only excep-

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[15]8 Stat. 22.

[16]8 Stat. 172.

[17]Salderondo *v.* The Nostra Signora del Carmino (D. C. 1794) 21 Fed. Cas. No. 12, 247; Reid *v.* The Vere, *supra.*

[18]Preamble to 13th Hague Convention, 1907.

[1]For recent English legislation on this subject, see the various Trading with the Enemy Acts, 1914-1916, 4 & 5 Geo. V, c. 87; 5 & 6 Geo. V, cc. 12, 79, 98, 105. See also Trotter, Law of Contract During War.

[2]The Hoop (1799) 1 C. Rob. 196; Hill *v.* Baker (1871) 32 Iowa 302; The Panariellos (1916) 32 T. L. R. 459; 1 Kent, Comm. *66.

[3]Robson *v.* Premier Oil & Pipe Line Co. [1915] 2 Ch. 124; see Griswold *v.* Waddington (N. Y. 1819) 16 Johns. *438.

[4]United States *v.* Barker (C. C. 1820) 24 Fed. Cas. No. 14,517; Kershaw *v.* Kelsey (1868) 100 Mass. 561; *cf.* Williams *v.* Paine (1897) 169 U. S. 55, 70, 18 Sup. Ct. 279.

[5]Willison *v.* Patteson (1817) 7 Taunt. 439; Scholefield *v.* Eichelberger (1833) 32 U. S. *586; see Watts, Watts & Co. *v.* Unione Austriaca etc. (D. C. 1915) 224 Fed. 188; 15 Columbia Law Rev. 608. This is true, whether the contracts are made directly, or indirectly through a neutral agent or partner. See Montgomery *v.* United States (1872) 82 U. S. 395.

[6]Matthews *v.* McStea (1875) 91 U. S. 7; see Potts *v.* Bell (1800) 8 T. R. 548; Crawford *v.* The William Penn (C. C. 1819) 6 Fed. Cas. No. 3,373.

tion is perhaps a contract induced by absolute necessity.[7] Ransom bonds were once held legal in England,[8] but are so no longer.[9]

Where the contract was made before the beginning of the war, the rules are equally simple, but much more difficult to apply. In general it may be said that the outbreak of a war between the countries of which the two contracting parties are citizens dissolves all contracts the performance of which would aid the enemy or involve trading with him.[10] And the practical test employed by the courts is this: does the contract, in its nature, involve continuity of performance by the parties thereto? If it does, it is dissolved by the war;[11] if it does not, the contract subsists, but the remedy is suspended until after the close of the war.[12] Perhaps the best example of a contract involving continuity of performance is the contract of partnership, which involves continuous efforts by all partners, and is therefore dissolved by the outbreak of war.[13] On the other hand, where the contract has been entirely performed, except that a debt is due from one party to the other, the debt is not destroyed by the war, but can be collected after its termination, since no continuous performance is here required.[14]

Some difficulty has been experienced by the courts in applying these principles to contracts of insurance and agency. In cases of insurance, where war occurs between the countries of the insurer and the insured, it is generally held that, though the payment of premiums is rendered illegal by the war, the policy is not thereby avoided, since the contract of insurance, while in one sense a continuing contract, is not strictly a contract of continuous performance; and payment of the accrued premiums at the end of the war renders the insurance company liable for loss under the policy.[15] Some courts, however, consider-

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[7]For example, a bottomry bond given on a ship driven into an enemy port for repairs to enable her to reach home. Crawford *v.* The William Penn, *supra;* see Hallet *v.* Jenks (1805) 7 U. S. 210, 219. It has been said that a contract made by a prisoner of war is valid. Maria *v.* Hall, 1 Taunt. *33, n.; see King *v.* Depardo (1807) 1 Taunt. *26, *28; 15 Columbia Law Rev. 608.

[8]Ricord *v.* Bettenham (1765) 3 Burr. 1734; *cf.* Anthon *v.* Fisher (1782) 3 Doug. 166.

[9]Act 22 Geo. III c. 25; unless permitted by an Order in Council. Act 27 & 28 Vict. c. 25, 45.

[10]Furtado *v.* Rodgers (1802) 3 Bos. & P. 191; Esposito *v.* Bowden (1857) 7 E. & B. 763; Zinc Corporation *v.* Hirsch [1916] 1 K. B. 541; see Cohen *v.* New York Mut. Life Ins. Co. (1872) 50 N. Y. 610.

[11]See New York Life Ins. Co. *v.* Clopton (1870) 70 Ky. 179; Hamilton *v.* Mutual Life Ins. Co. (C. C. 1871) 11 Fed. Cas. No. 5,986.

[12]New York Life Ins. Co. *v.* Clopton, *supra;* Cohen *v.* New York Mut. Life Ins. Co., *supra; cf.* Janson *v.* Driefontein Consolidated Mines [1902] A. C. 484.

[13]Stevenson & Sons *v.* Aktien-Gesellschaft [1916] 1 K. B. 763; see Griswold *v.* Waddington, *supra;* The William Bagaley (1866) 72 U. S. 377, 407.

[14]*Ex parte* Boussmaker (1806) 13 Ves. 71; Hoare *v.* Allen (Pa. 1789) 2 Dall. 102.

[15]New York Life Ins. Co. *v.* Clopton, *supra;* Hamilton *v.* Mutual Life Ins. Co., *supra;* Cohen *v.* New York Mut. Life Ins. Co., *supra.* This doctrine does not apply to insurance on the life of a belligerent actually serving in the fighting forces of the enemy. See cases in this note, *supra.*

ing payment of the premiums as a condition precedent to liability on the part of the insurance company, relieve the latter from liability;[16] while still others declare the policy forfeited, but allow recovery of the equitable value of the premiums paid.[17]

While some cases apparently lay down the rule in broad terms that the contract of agency is revoked by war,[18] the usual view is that this applies only to agencies requiring commercial intercourse, and that agencies which do not necessitate communication are not dissolved.[19] An excellent illustration of the former class of agencies is afforded by the recent case of *Distington Hematite Iron Co. Ltd.* v. *Possehl & Co.* [1916] 1 K. B. 811. In this case the defendants, a German firm, were the agents of the plaintiffs, a British firm, for the sale of the plaintiffs' products on the Continent. The contract of agency was declared by the court to involve a continuous relation on both sides, and was therefore held to be dissolved by the war, since any other conclusion would make a new contract for the parties. It results from this view of the contract of agency that, while an agent may receive payments for his principal, he cannot transmit the funds to him during the war.[20] And for the relationship to survive the outbreak of war, the assent of both principal and agent is necessary.[21]

Power of Courts over Measures Initiated by the People.—Of recent years the people of many of our states, seeking a remedy for the supposed derelictions of their representatives, have adopted constitutional amendments providing for the initiative, the referendum, and the recall. By these provisions the legislative power of the state is vested in a legislative assembly, but the people reserve to themselves the power to propose laws and amendments, and to adopt or reject them independently of the legislative assembly, and also the power to adopt or reject any act passed by that assembly.[1] The first

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So, contracts insuring the property of an enemy against capture or destruction by the government of the insurer are dissolved by war. Furtado *v.* Rodgers, *supra; Ex parte* Lee (1806) 13 Ves. 64.

[16]Dillard *v.* Manhattan Life Ins. Co. (1871) 44 Ga. 119; Worthington *v.* Charter Oak Life Ins. Co. (1874) 41 Conn. 372.

[17]New York Life Ins. Co. *v.* Statham (1876) 93 U. S. 24.

[18]Howell *v.* Gordon (1869) 40 Ga. 302; Conley *v.* Burson (1870) 48 Tenn. 145; Blackwell *v.* Willard (1871) 65 N. C. 555.

[19]Monsseaux *v.* Urquhart (1867) 19 La. Ann. 482; see Small's Adm'r. *v.* Lumpkin's Ex'r. (1877) 69 Va. 832; *cf.* Buford *v.* Speed (1875) 74 Ky. 338.

[20]See Insurance Co. *v.* Davis (1877) 95 U. S. 425; Fisher *v.* Krutz and Campbell (1872) 9 Kan. 501; Small's Adm'r. *v.* Lumpkin's Ex'r., *supra.*

[21]Insurance Co. *v.* Davis, *supra.* Where it is manifestly for the benefit of the principal that the agency continue, his assent will be presumed; but where it is clearly against his interest, his acquiescence must be proved. Williams *v.* Paine, *supra.* Obviously an agent cannot be appointed during war. United States *v.* Grossmayer (1869) 76 U. S. 72. But if the property of an alien enemy is proceeded against, he may apparently, even during a war, appoint an attorney to represent him in the action. See Buford *v.* Speed, *supra.*

[1]The constitutions of the following states make the initiative and the referendum applicable to both statutes and constitutional amendments: Arizona, Art. IV, Pt. I, § 1; Arkansas, Art. V, § 1; California, Art. IV, § 1; Colorado, Art. V, § 1; Missouri, Art. IV, § 57; Nebraska, Art. III, § 1; Nevada, Art XIX, § 3; North Dakota, Art. II, § 25, Art. XV, § 202;

power reserved to the people is known as the initiative, the second as the referendum. So eager have the people shown themselves to take the reins of government into their own hands that the constitutions generally declare that the veto power of the governor shall not extend to measures referred to the people;[2] and in some states the legislature either has no power to repeal a measure passed by means of the initiative or referendum,[3] or else only a limited power.[4]

The initiative and the referendum constitute a departure from previously existing forms of government; and many problems must arise for the courts in such a great change from representation to direct action by the people. It has been decided that the new system is not repulsive to the republican form of government guaranteed to the states by Article IV, § 4 of the Federal Constitution, but rather is in harmony with it;[5] and the Supreme Court of the United States has held that the question is a political one for Congress alone.[6] An interesting problem arises in the recent case of *State ex rel. Berry* v. *Superior Court* (Wash. 1916) 159 Pac. 92, as to the power of the courts over initiative measures. An act to facilitate the operation of the initiative and referendum provided that publicity be given to measures filed with the secretary of state by means of not more than two arguments in support nor more than three in opposition to such measure, to be printed at the expense of the person submitting them, and circulated among the citizens by the secretary of state.[7] It was sought to enjoin the secretary of state from printing the blank petitions and the arguments for a proposed initiative measure on the ground

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Oklahoma, Art. V, § 1; Oregon, Art. IV, § 1. An amendment to this effect has been proposed in Minnesota, Session Laws 1915 c. 385. By the constitutions in Washington, Art. II, § 1; Montana, Art. V, § 1; Utah, Art. VI, § 1 (2); South Dakota, Art. III, § 1, the initiative is applicable to laws only. The Ohio constitution, Art. II, § 1 *et seq.*, provides for an initiative by which laws and amendments are proposed, not to the people directly, but to their legislature.

[2]Arizona, Art. IV, Pt. I, § 1 (6); Arkansas, Art. V, § 1; California, Art. IV, § 1; Colorado, Art. V, § 1; Missouri, Art. IV, § 57; Montana, Art. V, § 1; North Dakota, Art. II, § 25; Oklahoma, Art. V, § 3; Oregon, Art. IV, § 1; South Dakota, Art. III, § 1. This is true as well of initiative as of referred measures. State *v.* Kline (1907) 50 Ore. 426, 93 Pac. 237. In Nebraska, Art. III, § 1 D, and Washington, Art. III, § 1 D, the veto power of the governor is declared not to extend to measures initiated by or referred to the people. By the Ohio constitution, Art. II § 1 B, the veto power does not extend to initiative measures approved by the people.

[3]Arizona, Art. IV, Pt. I, § 1 (6).

[4]Art. II, § 1c, of the Washington constitution deprives the legislative assembly of the right to repeal or amend any initiative measure for a period of two years after its passage. But ordinarily the assembly retains its right to repeal or amend any statute. Oklahoma, Art. V, § 7; *In re* Senate Resolution (1913) 54 Colo. 262, 130 Pac. 333; see Straw *v.* Harris (1909) 54 Ore. 424, 430, 103 Pac. 777.

[5]Kadderly *v.* City of Portland (1903) 44 Ore. 118, 75 Pac. 222. The initiative and the referendum as applied to municipalities do not raise the question whether a state has a republican form of government. State *ex rel.* Wagner *v.* Summers (1913) 33 S. D. 40, 144 N. W. 730.

[6]Pacific States Tel. & Tel. Co. *v.* Oregon (1911) 223 U. S. 118, 32 Sup. Ct. 224. Congress has settled the matter by admitting Oklahoma into the Union when its constitution contained initiative and referendum provisions

[7]Session Laws 1913 c. 138 §§ 26, 27.

that it contained a preamble which was improper and argumentative, the purpose of which was to have a third argument in favor of the measure printed at the expense of the state. The lower court held that it had no jurisdiction, because the question raised was political. But in a proceeding to review, the Supreme Court of Washington, by a vote of five to four, granted the injunction.

Though the preamble is not, properly speaking, an essential part of an act and cannot control the act,[8] it serves a useful purpose in determining the intent of the legislature where the language used is ambiguous.[9] It is a part of the bill. Under our division of governmental functions into the executive, the legislative and the judicial, the judiciary have no power to interfere with the other branches.[10] Are the various steps in the process of proposing and adopting an initiative measure the action of a legislative body? A legislative body has been defined to be one authorized and able to enact laws for the community.[11] As a matter of authority, the cases are few which have considered the question involved in the principal case. However, the general view is that the people acting under the initiative and the referendum are a legislative body and that therefore the secretary of state cannot be enjoined from filing an initiative measure.[12] As a matter of principle, it would seem that under the initiative and referendum there are two legislative bodies, the legislative assembly, and the people acting in proposing and adopting laws. The action of one is just as much legislation as is the action of the other; and unless it is specifically provided that the courts have jurisdiction over initiative measures, and to what extent, the courts ought not to interfere. It is true that strictly ministerial acts as distinguished from executive or political ones may be controlled by the courts;[13] but the problem involved in the principal case is not settled by saying that the secretary of state in filing a petition is acting ministerially and is therefore subject to the power of the courts. The secretary's act in itself is not of importance; but it is a necessary step in the process of legislation. An injunction against the secretary of state interferes with the exercise of the legislative function by the people. The majority of the judges in the principal case were doubtless anxious to prevent the waste of public money, yet the better reason is with the minority, who considered that the court was powerless to interfere with the legislative department of the government.[14]

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[8]Jones, Statute Law Making, 70 *et seq.*; Sedgwick, Statutory and Constitutional Law, 64.

[9]Beal, Cardinal Rules of Legal Interpretation (2nd ed.) 253; Brown *v.* Erie R. R. (1914) 87 N. J. L. 487, 91 Atl. 1023.

[10]Pacific States Tel. & Tel. Co. *v.* Oregon, *supra*; Vicksburg R. R. *v.* Lowry (1883) 61 Miss. 102.

[11]See Burke *v.* Wood (1908) 162 Fed. 533, 538.

[12]State *ex rel.* Bullard *v.* Osborn (1914) 16 Ariz. 247, 143 Pac. 117; Pfeifer *v.* Graves (1913) 88 Ohio 473, 104 N. E. 529; Duggan *v.* City of Emporia (1911) 84 Kan. 429, 113 Pac. 436; State *ex rel.* Att'y Gen'l *v.* Dunbar (1906) 48 Ore. 109, 85 Pac. 337; *cf.* Friendly *v.* Olcott (1912) 61 Ore. 580, 123 Pac. 53.

[13]2 High, Injunctions (4th ed.) § 1326.

[14]Session Laws 1913 c. 138 of the State of Washington does not anywhere give the courts power to revise or supervise the contents of an initiative measure. By § 17 the court's power to enjoin the secretary of state can be used only where there is a question as to the validity and number of the signatures to a petition.

LIABILITY OF LANDLORD FOR PERSONAL INJURIES TO TENANT ON BREACH OF COVENANT TO REPAIR.—Generally speaking, the maxim *caveat emptor* applies to a contract of lease, and no duty of the landlord to repair the premises arises out of the mere relation of landlord and tenant.[1] There is no implied warranty of fitness for a particular purpose,[2] or even of the safety of the premises when leased,[3] though the landlord may be liable in tort for resultant injuries if he conceals an obscure defect from the tenant,[4] and in one or two jurisdictions he is even held to the duty of reasonable care and diligence in ascertaining the existence of such defects.[5] Where the landlord reserves control of part of the leased premises for the common use of tenants, such as stairways and halls in apartment-houses or office-buildings, he is under a duty to exercise reasonable care to keep such reserved portions in a reasonably safe condition,[6] and for breach of such duty an action of tort for resultant personal injuries will lie.[7] Where there is no covenant or agreement by the landlord to repair, but he undertakes to do so, and the tenant suffers personal injuries due to the negligent performance, the landlord is liable in tort;[8] but his liability is predicated solely on his negligence, and not on the breach of any duty peculiar to the relationship.[9] For mere omission to repair, in the absence of fraud, concealment, or express agreement, the landlord is not liable in any form of action.[10]

It is also clearly settled that a tenant cannot maintain an action of tort against his landlord for personal injuries by reason of a mere breach of the landlord's agreement to repair.[11] However, the recent case of *Robinson* v. *Heil* (Md. 1916) 98 Atl. 195 holds that where per-

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[1]Tiffany, Landlord and Tenant, 556. 574; Gott *v.* Gandy (1853) 2 E. & B. 845; Hill *v.* Day (1911) 108 Me. 467, 81 Atl. 581; see 8 Columbia Law Rev. 666.

[2]Hill *v.* Day, *supra*; Cohen *v.* Plumtree (1912) 170 Ill. App. 311; see 16 Columbia Law Rev. 609, *infra*.

[3]Clark *v.* Sharpe (1912) 76 N. H. 446, 83 Atl. 1090; Renard *v.* Grenthal (1913) 81 Misc. 135, 142 N. Y. Supp. 328.

[4]Howard *v.* Washington Water Power Co. (1913) 75 Wash. 255, 134 Pac. 927; see Scoggins *v.* Atlantic etc. Cement Co. (1912) 179 Ala. 213, 60 So. 175.

[5]Willcox *v.* Hines (1898) 100 Tenn. 538, 46 S. W. 297; see Barron *v.* Liedloff (1905) 95 Minn. 474, 104 N. W. 289.

[6]Morse *v.* Houghton (1912) 158 Ia. 279, 136 N. W. 675. Some cases hold that the duty of the landlord in respect to the maintenance of a common passage way in premises occupied by several tenants is that of due care to keep it in such condition as it was in, or purported to be in, at the time of letting. Quinn *v.* Perham (1890) 151 Mass. 162, 23 N. E. 735; but see Andrews *v.* Williamson (1906) 193 Mass. 92, 78 N. E. 737.

[7]Glassman *v.* Abromovich (1911) 163 Ill. App. 388; McGinley *v.* Alliance Trust Co. (1901) 168 Mo. 257, 66 S. W. 153.

[8]Tarnogurski *v.* Rzepski (1916) 252 Pa. 507, 97 Atl. 697; Salvetta *v.* Farley (1910) 123 N. Y. Supp. 230.

[9]Michael *v.* Billings etc. Co. (1912) 150 Ky. 253, 150 S. W. 77; Fulmele *v.* Forrest (1913) 27 Del. 155, 86 Atl. 733.

[10]Keegan *v.* Heilman Brewing Co. (1915) 129 Minn. 496, 152 N. W. 877; Shinkle *v.* Birney (1903) 68 Ohio 328, 67 N. E. 715; Griffin *v.* Freeborn (1914) 181 Mo. App. 203, 168 S. W. 219.

[11]Tiffany, Landlord and Tenant, 592-595; Dustin *v.* Curtis (1907) 74 N. H. 266, 67 Atl. 220; Davis *v.* Smith (1904) 26 R. I. 129, 58 Atl. 630.

sonal injuries result from a negligent failure to make repairs agreed upon, the tenant may maintain a tort action. There is a considerable body of authority for this proposition.[12] These cases necessarily proceed on the theory that the landlord owes the tenant a duty apart from contract.[13] But as the mere relationship of landlord and tenant creates no duty to repair, it is difficult to see how negligent failure to repair can give rise to a tort liability. The doctrine is also strange in that it imposes a tort liability for mere negligent omission to perform a covenant, where no such action could be maintained for a wilful breach. Some cases, refusing to follow this illogical doctrine in its entirety, have distinguished between covenants to make specific repairs or to repair generally, and covenants to keep premises in a safe and tenantable condition. In the former class of cases, no recovery in tort is allowed, even where the failure to repair was negligent; but in the latter class, since the tenant relies on the engagement to keep the premises safe, and since payment of damages for personal injuries resulting from a breach would be in the contemplation of the parties in making the contract, the landlord is held liable in tort.[14] The distinction seems unsound, for the covenant to keep the premises safe and tenantable is a mere contract like any other, for the breach of which a tort action does not lie. The recent case of *Kohnle* v. *Paxton* (Mo. 1916) 188 S. W. 155 adopts the sound view, and denies a recovery in tort where the landlord agreed to keep the premises tenantable. If the tort liability is based on the relationship, it runs counter to the proposition that the relationship carries with it no duty to repair. In attempting to explain the doctrine, it has been said that where a landlord agrees to keep the premises in a safe and tenantable condition, he is in effect reserving control of them, with nothing in the tenant but a right to use them.[15] But such a construction of the lease would defeat the intention of the parties, which is to create an estate in the tenant, with a mere incidental engagement by the landlord to keep the premises safe.

The Affirmative Charge in Criminal Trials.—In a civil trial where the proof is all on one side, the judge may direct a verdict for the plaintiff or the defendant, as the case may be,[1] but this power of the court is more limited in criminal trials, except in the case of

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[12]Barron *v.* Liedloff, *supra*; Stillwell *v.* South Louisville Land Co. (1900) 22 Ky. Law Rep. 785, 58 S. W. 696.

[13]In Johnston *v.* Nichols (1915) 83 Wash. 394, 145 Pac. 417, the court predicates the landlord's liability on his failure to perform "some duty imposed by law or by contract". In Glynn *v.* Lyceum Theater Co. (1913) 87 Conn. 237, 87 Atl. 796, it is said that the landlord owes a duty not to be negligent, and failure to perform the contract duty to repair may in a proper case be negligent. The definitions of "negligent failure to repair" by the courts are very vague.

[14]See Miles *v.* Janvrin (1907) 196 Mass. 431, 82 N. E. 708; s. c. (1909) 200 Mass. 514, 86 N. E. 785; Cromwell *v.* Allen (1909) 151 Ill. App. 404.

[15]See Miles *v.* Janvrin, *supra*; Barron *v.* Liedloff, *supra*.

[1]See United States *v.* Taylor (C. C. 1882) 11 Fed. 470; State *v.* Riley (1893) 113 N. C. 648, 18 S. E. 168.

a special verdict.[2] The accused has a constitutional right to trial by jury in criminal cases[3] which he cannot even waive voluntarily,[4] much less involuntarily, and he has the same right to have twelve laymen pronounce on the truth or falsity of each material averment of the indictment if the evidence against him is clear and uncontradicted as he unquestionably would have if it were doubtful and conflicting.[5] By a plea of not guilty the accused denies the truth of the information or indictment and imposes on the state the burden of proving his guilt beyond a reasonable doubt.[6] The Constitution requires an actual submission of the case to the jury for their consideration and decision,[7] and it is the right of the jury to pass on the credibility of the witnesses for the prosecution, even though they are not impeached.[8] It is true that the court may direct a verdict of acquittal, just as it might grant a new trial if of the opinion that a verdict of guilty was against the evidence.[9] But a judge cannot set aside a verdict of acquittal because of the Constitutional provision against twice putting a man in jeopardy for the same offense,[10] and therefore he cannot do the same thing by an instruction for conviction before verdict.[11]

A charge that, if the jury believe the evidence beyond a reasonable doubt, they must find the defendant guilty, is less objectionable, since

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[2]See State *v.* Riley, *supra.* The judges in England at one time claimed a more extensive power in cases of criminal libel. By law, the meaning, effect, and interpretation of all language is a matter of legal construction for the court, and hence the judges claimed that the jury could pass only on the fact of publication and the truth of the averments and innuendoes claimed in the indictment. They maintained that, when these points were established, a criminal prosecution for libel was peculiar in that the whole matter was spread on the record, and the question of guilt, as in the case of a special verdict, was a question of law for the court. But the Fox Libel Act of 1792 established the right of the jury to render a general verdict in a libel case as in other criminal cases, and similar acts have been passed in a number of our states. See discussion by Shaw, C. J., in Commonwealth *v.* Anthes (1857) 71 Mass. 185, 212.

[3]Federal Constitution, 6th Amendment.

[4]Harris *v.* People (1889) 128 Ill. 585, 21 N. E. 563.

[5]Konda *v.* United States (7 C. C. A. 1908) 166 Fed. 91.

[6]State *v.* Picker (1895) 64 Mo. App. 126.

[7]United States *v.* Taylor, *supra.*

[8]United States *v.* Taylor, *supra.*

[9]United States *v.* Fullerton (C. C. 1870) 25 Fed. Cas. No. 15, 176; Commonwealth *v.* Yost (1900) 197 Pa. 171, 46 Atl. 845.

[10]Federal Constitution, 5th Amendment.

[11]Howell *v.* People (N. Y. 1875) 5 Hun 620, aff'd 69 N. Y. 607; United States *v.* Taylor, *supra.* Undoubtedly the general rule is that the court cannot direct a verdict of guilty in a criminal case. United States *v.* Fenwick (C. C. 1839) 25 Fed. Cas. No. 15,087; State *v.* Riley, *supra*; Konda *v.* United States, *supra.* There are a few cases *contra*: United States *v.* Anthony (C. C. 1873) 24 Fed. Cas. No. 14,459; Commonwealth *v.* Brown (1905) 28 Pa. Super. Ct. 296; People *v.* Elmer (1896) 109 Mich. 493, 67 N. W. 550. But even in the last named jurisdiction it was held error to discharge the jury and direct a verdict of guilty to be entered by the clerk. People *v.* Collison (1891) 85 Mich. 105, 48 N. W. 292. In Commonwealth *v.* Brown, *supra,* the plea was former acquittal, and there were no disputed questions of fact, the only evidence offered being the record of the former trial. The judge's ruling on this plea might be defended on the ground that the construction of the record is the function of the court.

such a charge expressly leaves the question of credibility to the jury. At common law and in the federal courts, the judge has the right to advise the jury of his opinion as to the weight and effect of the evidence,[12] but a number of the states, by constitutional or statutory provisions, have forbidden any expression by the trial judge on the weight or effect of testimony.[13] Independently of such statutory provisions, however, charges to this effect have been generally upheld where all the facts and evidence point to guilt, or where the evidence is uncontroverted or admitted by the defendant.[14] Yet a number of these charges were in cases of misdemeanors not involving the question of intent,[15] and the same courts have admitted that the affirmative charge is of doubtful propriety in criminal cases.[16]

In the recent case of *Warren* v. *State* (Ala. 1916) 72 So. 624, the court upheld a charge that the jury must find the defendant guilty of murder if they believed the evidence beyond a reasonable doubt. This was on the ground that the law presumes malice from a killing with a deadly weapon, and that there was no evidence to the contrary, either in the attending circumstances or in the rebuttal evidence of the accused. The dissenting opinion maintained that the charge was erroneous, on the ground that a material fact in the case, the criminal intent, rested in inference, and that it was the province of the jury alone to draw the inference of malice from the manner of the killing. At common law, malice was presumed from the fact of the killing, and the accused was obliged to produce evidence of justification, excuse, or alleviation.[17] But the modern tendency is against maintaining the presumption to its former extent,[18] and it has even been held that the law never implies malice from any state of facts, but that such a deduction is always to be made by the jury.[19] Yet the prevailing view is that the law presumes malice from the use of a deadly weapon, and that it is then incumbent on the accused to pro-

[12]Commonwealth *v.* Child (1829) 27 Mass. 252; Johnston *v.* Commonwealth (1877) 85 Pa. 54; Simmons *v.* United States (1891) 142 U. S. 148, 12 Sup. Ct. 171.

[13]State *v.* Barry (1902) 11 N. D. 428, 92 N. W. 809. But even in such jurisdictions, the judge may state in his charge what facts are in evidence and what are not. People *v.* King (1865) 27 Cal. 507. It is frequently stated that the jury are the judges both of law and of fact in criminal cases, but this is not absolutely true. In rendering a verdict of not guilty, the criminal jury may absolutely disregard the judge's instructions as to the law, and yet there is no recourse from their decision. At common law it seems that there was no attaint against them such as was allowed in a civil case. See Commonwealth *v.* Anthes, *supra*, at p. 202. Yet a verdict of guilty may be set aside if the rulings of the trial judge were erroneous, and this must be on the theory that the jury are expected to follow the charges given. Hamilton *v.* People (1874) 29 Mich. 173, 189; United States *v.* Battiste (C. C. 1835) 24 Fed. Cas. No. 14,545.

[14]Duffy *v.* People (N. Y. 1862) 5 Park. Cr. 321; State *v.* Vines (1885) 93 N. C. 493; Derby *v.* State (1897) 60 N. J. L. 258, 37 Atl. 614; see Parrish *v.* State (1904) 139 Ala. 16, 51, 36 So. 1012, 1024.

[15]State *v.* McLain (1889) 104 N. C. 894, 10 S. E. 518; Derby *v.* State, *supra*.

[16]See Parrish *v.* State, *supra*.

[17]4 Bl. Comm. 201; see People *v.* Schryver (1870) 42 N. Y. 1.

[18]2 Chamberlayne, Modern Law of Evidence, § 1137.

[19]Buckner *v.* Commonwealth (1879) 77 Ky. 601; People *v.* Flack (1891) 125 N. Y. 324, 26 N. E. 267.

duce evidence in rebuttal, unless the evidence which proves the killing rebuts the presumption.[20] Hence it seems that the affirmative charge is justifiable under such circumstances, though it is hardly to be commended.

Apportionment Between Life Tenant and Remainderman of Expenses and Cost of Improvements.—Where there are present and future interests in the same thing, the question of apportionment often arises. In the case of personal property, for example, the distribution of extra dividends has caused much litigation.[1] In the case of realty, disputes are frequent as to who shall bear the cost of repairs and improvements. The terms of the instrument creating the two estates are naturally controlling, if they cover the point.[2] In the absence of any definitely expressed intention on the part of the grantor, the general rule is that all ordinary expenses, such as taxes and repairs, are to be paid by the life tenant, and where property is given to a trustee, he shall charge the expense of care and management of the estate to income.[3] A life tenant has no right to recover from the remainderman for improvements voluntarily made during the continuance of the estate.[4] But when the improvements are made without his procurement by an executor or trustee, this rule does not apply.[5] So where special taxes or assessments have been levied on the property for permanent improvements, "betterments", which increase the value of the remainder, or where a substantial portion of the betterment would be enjoyed by the remainderman, the cost should be borne ratably by the life tenant and remainderman, such assessments being regarded as an encumbrance on the whole estate,[6] unless the improvement is likely to wear out during the probable existence of the life estate.[7] Even though the improvement is not permanent, it is generally held that if it is likely that it will last beyond the probable life of the life tenant the expense should be apportioned.[8]

As to the method of apportionment, the courts apply different rules, ultimately reaching the same result, some holding that the life tenant should pay the interest on the amount during his life and at his death the remainderman should pay the principal,[9] others that the

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[20]Commonwealth *v.* Gibson (1905) 211 Pa. 546, 60 Atl. 1086; Mann *v.* State (1906) 124 Ga. 760, 53 S. E. 324; State *v.* Lane (1914) 166 N. C. 333, 81 S. E. 620.

[1]See 4 Columbia Law Rev. 130; 7 Columbia Law Rev. 344.

[2]Moseley *v.* Marshall (1860) 22 N. Y. 200.

[3]Peirce *v.* Burroughs (1878) 58 N. H. 302; Hackworth *v.* Louisville etc. Stone Co. (1899) 106 Ky. 234, 50 S. W. 33.

[4]"Such improvements must be deemed to have been made by the life tenant for his own benefit and enjoyment during the pendency of his estate." Hagan *v.* Varney (1893) 147 Ill. 281, 35 N. E. 219.

[5]See Matter of Pollock (N. Y. 1877) 3 Redf. 100, 118.

[6]Huston *v.* Tribbetts (1898) 171 Ill. 547, 49 N. E. 711; Plympton *v.* Boston Dispensary (1871) 106 Mass. 544; Bobb *v.* Wolff (1893) 54 Mo. App. 515; Moore *v.* Simonson (1895) 27 Ore. 117, 39 Pac. 1105.

[7]Raiburn *v.* Wallace (1887) 93 Mo. 326, 3 S. W. 482. A remainderman is not ordinarily chargeable for conjectural benefits which he may never receive. Wordin's Appeal (1899) 71 Conn. 531, 42 Atl. 659.

[8]Huston *v.* Tribbetts, *supra;* Bobb *v.* Wolff, *supra.*

[9]Plympton *v.* Boston Dispensary, *supra.*

life tenant should pay the present value of an annuity equal to the annual interest running during the number of years which constitute the expectancy of his life and the balance should be paid by the remainderman.[10] Where the gift is to a trustee to pay the rents and profits to one for life, with remainder over, the trustee should charge the cost of the improvement to the *corpus* of the estate and thus make the life interest bear its share in diminished income, such payment itself being an equitable apportionment.[11] Where the estates are legal, an assessment for a permanent improvement is regarded as an encumbrance upon the estate, and if the life tenant pays the assessment, or if his property is about forfeited for failure to pay, he may go into equity and obtain contribution from the remainderman on the principle of suretyship.[12]

Likewise the nature of an annuity suggests that it should be paid out of the income if that is sufficient,[13] but this depends largely on the wording of the will and the circumstances of the case, and if the annuity is charged on a particular fund, both principal and income are applicable *pro rata*.[14] Also, ordinary taxes on unimproved property paying no income should be paid by the remainderman, or, if paid by a trustee, should be charged to principal,[15] and a life tenant is not bound to build on the property so as to make the land sufficiently productive to pay taxes.[16] Similarly a trustee usually must look for his compensation, if any, to the income,[17] although where he performs extra services valuable to the principal fund a charge on the principal will be allowed. The sale and conversion of realty is generally regarded as such an extra service.[18]

The question of apportionment came up in an unusual form in the recent case of *Sheffield* v. *Cooke* (R. I. 1916) 98 Atl. 161. There, instead of an estate for life and a remainder, there was an equitable fee in the residue of an estate subject to an executory devise on failure of issue. The trustees asked for instructions as to the apportionment of assessments for permanent improvements, taxes on unimproved land, and certain annuities charged on the residue, as well as their own compensation for converting realty into personalty in accordance with the provisions of the will. The court held that all

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[10]Moore *v.* Simonson, *supra.*

[11]Rhode Island Hosp. Trust Co. *v.* Babbitt (1900) 22 R. I. 113, 46 Atl. 403.

[12]Bobb *v.* Wolff, *supra;* Chamberlin *v.* Gleason (1900) 163 N. Y. 214, 57 N. E. 487.

[13]Cummings *v.* Cummings (1888) 146 Mass. 501, 16 N. E. 401.

[14]Yates *v.* Yates (1860) 28 Beav. 637; *In re* Muffett (1884) 39 Ch. D. 534.

[15]Stone *v.* Littlefield (1890) 151 Mass. 485, 24 N. E. 592; see Patterson *v.* Johnson (1885) 113 Ill. 559, 577. This is the only case where payment from the principal places no burden on the life tenant and does not amount to an apportionment, as he pays none of the tax and, receiving no income from the property, loses none.

[16]Clark *v.* Middlesworth (1882) 82 Ind. 240.

[17]Perry, Trusts, § 919.

[18]Hite's Devisees *v.* Hite's Ex'r. (1892) 93 Ky. 257, 269, 20 S. W. 778; Loring, Trustee's Handbook, 37; Penn-Gaskell's Estate (1904) 208 Pa. 342, 57 Atl. 714; Rhode Island Hosp. Trust Co. *v.* Waterman (1901) 23 R. I. 342, 50 Atl. 389.

these expenses should be charged to the *corpus,* thereby working an equitable apportionment. It is a simple matter to apportion such expenses between a life tenant and a remainderman, because the mortality tables show the relative values of their interests, but there is no apparent method of computing the duration of a fee subject to executory limitations, on which to base the present value of an annuity. Thus the court was limited to this method of equitable apportionment, which, indeed, seems the simplest and best method where it is applicable.

The Declaration and Rescission of Cash and Stock Dividends.—The duty of the board of directors of a corporation to declare cash dividends upon the accumulation of a sufficiently large amount of available profits is an indefinite obligation, generally unenforcible in the absence of proof of bad faith.[1] In the ordinary case the stockholder acquires a right to a dividend upon his stock only when the directors have, in the proper exercise of their powers, declared the dividend. The act of declaration establishes the relation of debtor and creditor between the corporation and the stockholder, without any further act of the directors.[2] There is a tendency, however, to regard the right which is thus granted to the stockholder as defeasible at the discretion of the directors, acting for a reasonably proper cause.[3] Furthermore, this theory is not universal, and a specific act of appropriation to the stockholder is sometimes required.[4] Until such an act is done, then, it is held that no debt has been created, and the directorate is free to rescind the declaration without legal injury to the stockholder.[5] When

[1]Mulcahy *v.* Hibernia S. & L. Society (1904) 144 Cal. 219, 77 Pac. 910; see Jackson's Adm'rs. *v.* Newark Plankroad Co. (1865) 31 N. J. L. 277. However, it is not unusual for a corporation to guarantee dividends upon its stock. The stockholder's right to such dividends does not accrue upon the date set in the guaranty; Taft *v.* Hartford etc. R. R. (1866) 8 R. I. 310; there is an implied condition that a sufficient amount of accumulated profits be available. Jermain *v.* Lake Shore etc. Ry. (1883) 91 N. Y. 483; Boardman *v.* Lake Shore etc. Ry. (1881) 84 N. Y. 157. The right to sue upon the guaranty is said to vest in the stockholder when both contingencies are fulfilled, but, being an incident of the stock, passes with it on assignment. Boardman *v.* Lake Shore etc. Ry., *supra.* It will be observed, however, that when the directors have declared the dividend, the right to it is no longer an incident of the stock, and an assignment of the stock does not transfer the dividend. See Jermain *v.* Lake Shore etc. Ry., *supra.* This leads to the conclusion that the rights to the dividend and on the guaranty become fixed and vested in the stockholder only after the declaration.

[2]McLaran *v.* Crescent Planing Mill Co. (1906) 117 Mo. App. 40, 93 S. W. 819; Wheeler *v.* Northwestern Sleigh Co. (C. C. 1889) 39 Fed. 347.

[3]See Beers *v.* Bridgeport Spring Co. (1875) 42 Conn. 17.

[4]Ford *v.* Easthampton Rubber Thread Co. (1893) 158 Mass. 84, 32 N. E. 1036. But for the suggestion that a money dividend immediately becomes the property of the stockholder, see King *v.* Paterson & H. R. R. R. (1860) 29 N. J. L. 82; *cf.* Spooner *v.* Phillips (1892) 62 Conn. 62, 24 Atl. 524.

[5]Ford *v.* Easthampton Rubber Thread Co., *supra*; see Dock *v.* Schlichter Jute Cordage Co. (1895) 167 Pa. 370, 31 Atl. 656; *contra,* McLaran *v.* Crescent Planing Mill Co., *supra.* Where dividends have been illegally declared, under a misapprehension of the existence of profits, they may be reclaimed by the corporation even after payment to the stockholders, on the theory that they had been paid and received under a mutual mistake. Grant *v.* Ross (1896) 100 Ky. 44, 37 S. W. 263.

enough has been done to establish constructively a fund to the credit of the stockholder, he is not only a creditor of the corporation but also the beneficiary of a trust, performance of which equity will aid him to compel.[6] A transfer of stock after the debt has been created does not operate to assign the right to the dividend, which, after vesting in the stockholder, is no longer an incident of the stock.[7]

A corporation may, however, instead of distributing its surplus in the form of cash dividends, choose to add it to the amount of its capital stock, and distribute the shares which represent the increase of its capital among its stockholders. Such an action does not diminish the property of the corporation, which remains precisely as great as it was before;[8] it increases the capital stock of the company and the individual holdings of the stockholders, although the actual value of their holdings in the aggregate remains unchanged. An increase of capital stock may only be made with the authorization of the stockholders themselves, followed by the issue of the new stock and compliance with certain formalities of the law.[9] In the recent case of *Staats* v. *Biograph Company* (U. S. C. C. A. 2nd Cir. 1916) 55 N. Y. L. J. 1327, the directors of the corporation voted a dividend of stock in the company, payable in scrip certificates, which could be converted, at the option of the directors, wholly or partly into cash or some form of interest-bearing obligation. The vote was announced to the stockholders, but at a subsequent meeting the directors rescinded their determination. It was held that the plaintiff, a stockholder, could not complain of the rescission. Inasmuch as the vote of the directors is but the first step in the procedure which results in the declaration of a stock dividend, it would seem reasonable and in just accord with the intention of the corporation that no indefeasible right to the dividend was created in the shareholders thereby.[10] Where, however, the board of directors announce a dividend of shares of the company's stock which represent not an increase of the capital but an investment of the surplus, the same principle should apply as in the case of a dividend of cash, or of profits invested in the stock of another company;[11] the declaration gives the shareholder a vested right which cannot be defeated except for proper cause.[12]

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[6]Beers *v.* Bridgeport Spring Co., *supra;* LeRoy *v.* Globe Ins. Co. (N. Y. 1836) 2 Edw. Ch. 657.

[7]Bright *v.* Lord (1875) 51 Ind. 272; see Jermain *v.* Lake Shore etc. Ry., *supra.* The same rule applies to a scrip cash dividend payable in the future "at the pleasure of the company". Billingham *v.* Gleason Mfg. Co. (N. Y. 1905) 101 A. D. 476, 91 N. Y. Supp. 1046, aff'd. 185 N. Y. 571, 78 N. E. 1099. Dividends belong to those who are stockholders at the time of the declaration, not at the time when the profits accrued from which the dividends are declared. Goodwin *v.* Hardy (1869) 57 Me. 143.

[8]See Williams *v.* Western Union Tel. Co. (1883) 93 N. Y. 162; Green *v.* Bissell (1907) 79 Conn. 547, 65 Atl. 1056.

[9]Terry *v.* Eagle Lock Co. (1879) 47 Conn. 141; N. Y. Consol. Laws c. 59, §§ 62, 63, 64, am'd. L. 1913 c. 305; N. J. Comp. Stat., § 27, p. 1612.

[10]Terry *v.* Eagle Lock Co., *supra.* Furthermore, the directors are always free to rescind an illegal stock dividend. Hollingshead *v.* Woodward (N. Y. 1885) 35 Hun 410.

[11]See City of Allegheny *v.* Pittsburg, Allegheny etc. Ry. (1897) 179 Pa. 414, 36 Atl. 161; Green *v.* Bissell, *supra.*

[12]*Cf.* Dock *v.* Schlichter Jute Cordage Co., *supra.* However, even under this ruling, a vested right is created after some act of appropriation by the directors. But a court would probably be as cautious in enforcing this right when such a course might embarrass the corporation as in the case of a real cash dividend. See Beers *v.* Bridgeport Spring Co., *supra.*

RECENT DECISIONS.

DENTON D. ROBINSON, *Editor-in-Charge.*
EDWARD I. DEVLIN, JR., *Associate Editor.*

ADMIRALTY—SALE OF SHIP AT INSTANCE OF MINORITY OWNERS—JURISDICTION.—The minority owners of a ship, being dissatisfied with the management of the same by the majority owners, brought an equity suit in the state court praying for a sale of the ship, and a division of the proceeds. *Held,* the suit cannot be maintained in a state court, but must be brought in admiralty. *Fischer* v. *Carey* (Cal. 1916) 159 Pac. 577.

U. S. Rev. Stat. § 563 cl. 8 gives the federal courts jurisdiction of all civil causes of admiralty, "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it". Where there is a conflict between the owners as to whether the ship shall or shall not be employed, admiralty will allow the ship to be employed by the owner so desiring, upon his giving bond to the other for safe return. See *Lewis v. Kinney* (C. C. 1879) 15 Fed. Cas. No. 8325; Hughes, Admiralty 296. But if the parties agree that the vessel shall be used, but differ merely as to the method, the American admiralty courts have always exercised the power to decree a sale where the dissension is between equal owners, *The Seneca* (C. C. 1829) 21 Fed. Cas. No. 12,670; see *Coyne* v. *Caples* (D. C. 1881) 8 Fed. 638; *Tunno* v. *The Betsina* (D. C. 1857) 24 Fed. Cas. No. 14,236; *The Ocean Belle* (D. C. 1872) 18 Fed. Cas. No. 10,402; Hughes, Admiralty 297; Freeman, Cotenancy and Partition (2nd ed.) § 392, though they have consistently refused to do so on suit by the minority owners. *Lewis* v. *Kinney, supra*; *Tunno* v. *The Betsina, supra*; *The Ocean Belle, supra*; See *The Orleans* v. *Phoebus* (1837) 36 U. S. 175; Hughes, Admiralty 297; Freeman, *op. cit.* § 392. The very fact, however, that the court entertains the action shows that it has sufficient jurisdiction to make the decree if it so wishes. Although opposed to the weight of authority in denying the state courts concurrent jurisdiction, *Andrews* v. *Betts* (1876) 8 Hun 322; *Reynolds* v. *Nielson* (1903) 116 Wis. 483, 93 N. W. 455; *Swain* v. *Knapp* (1884) 32 Minn. 429, 21 N. W. 414; Knapp, Partition 491, the principal case seems correct. The saving clause of the federal statute has been interpreted to give the state courts a concurrent jurisdiction only over common law remedies, *The Moses Taylor* (1866) 71 U. S. 411, and hence they should have no power to order the sale of the ship, which, in its nature, is an action *in rem. The Glide* (1897) 167 U. S. 606, 17 Sup. Ct. 930; Benedict, Admiralty § 128. Nor will their power over partnership matters ordinarily give the state equity courts jurisdiction, for the owners of a vessel are presumed to be tenants in common, and not partners. Hughes, Admiralty § 158; *Revens* v. *Lewis* (C. C. 1835) 20 Fed. Cas. No. 11,711. Although the objection might be raised that in such a case the minority is left without a remedy, the rule of majority control and the possibility that public interest might suffer by allowing capricious contentions to tie up commerce, would indicate that the holding of the principal case is sound. *Tunno* v. *The Betsina, supra.*

ASSAULT AND BATTERY—DAMAGES—HUMILIATION ARISING FROM DISFIGUREMENT OF PERSON.—In an action for assault and battery, *held,*

the plaintiff can recover for humiliation arising from a permanent disfigurement of his thumb. *Patterson* v. *Blatti* (Minn. 1916) 157 N. W. 717. Although it is now well settled that mental suffering resulting from physical injury is a proper element of damages, Sutherland, Damages (3rd ed.) § 95, some courts refuse to allow damages for future humiliation caused by a maimed and disfigured body. *Chicago, B. & Q. R. R.* v. *Hines* (1892) 45 Ill. App. 299; *Gulf, C. & S. F. Ry.* v. *Dickens* (1909) 54 Tex. Civ. App. 637, 118 S. W. 612; see *Giffen* v. *City of Lewiston* (1898) 6 Idaho 231, 248, 55 Pac. 545. While it is argued that such an element is remote, speculative, and intangible and varies with the temperament of the person injured, still no suffering is more natural or probable than that arising from disfigurement, and the argument of remoteness seems "more refined and subtle than practical and humane". *Shortridge* v. *Scarritt Est. Co.* (1910) 145 Mo. App. 295, 130 S. W. 126; *Coombs* v. *King* (1910) 107 Me. 376, 78 Atl. 468; *Gray* v. *Washington Power Co.* (1903) 30 Wash. 665, 71 Pac. 206. Indeed, such objections consistently applied would entirely eliminate mental suffering as an element of damages. See *Gray* v. *Washington Power Co., supra.* Mental suffering resulting directly from a physical injury or from slander is certainly as speculative an element as humiliation arising from the same cause, and yet the courts find no difficulty in dealing with such cases. The weight of authority allows a recovery for humiliation resulting from negligence, *Rice* v. *City of Council Bluffs* (1904) 124 Iowa 639, 100 N. W. 506; *Amanta* v. *Michigan Cent. R. R.* (1913) 177 Mich. 280, 143 N. W. 76; *Heddles* v. *Chicago & N. W. Ry.* (1890) 77 Wis. 228, 46 N. W. 115, and *a fortiori* the same result is eminently proper when malice is an ingredient of the tort. That such an ingredient might justify a widening of the scope of damages has been admitted even by a staunch supporter of the minority view. See *Chicago, B. & Q. R. R.* v. *Hines, supra.*

Bankruptcy — Criminal Concealment of Property — Jurisdiction over the Crime.—Where a bankrupt has withheld goods in New York contrary to the Bankruptcy Law, is he denied his constitutional right to trial by jury in the state where the offense was committed, if convicted of concealment in New Jersey where the bankruptcy proceedings took place? *Held,* for the defendant on the ground that the concealment took place in New York. *Gretsch* v. *United States* (C. C. A. 3rd Cir. 1916) 231 Fed. 57.

One who "knowingly and fraudulently concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy" is guilty of a crime. 30 Stat. 554 § 29b, cl. 1. Although the crime cannot under the statute be committed before bankruptcy, the physical concealment may occur prior thereto, and the continual withholding of assets after bankruptcy without further act will constitute the offense. *In re Cramer* (D. C. 1909) 175 Fed. 879; *Glass* v. *United States* (3 C. C. A. 1916) 231 Fed. 65. Since it is a continuing crime, *United States* v. *Cohn* (C. C. 1906) 142 Fed. 983; *In re Quackenbush* (D. C. 1900) 102 Fed. 282; *United States* v. *Rhodes* (D. C. 1913) 212 Fed. 513; *Johnson* v. *United States* (1 C. C. A. 1908) 163 Fed. 30; 2 Remington, Bankruptcy § 2319, the physical concealment seems of no importance, particularly inasmuch as a subsequent revelation of the existence and location of the property at the first opportunity would deprive the physical act of all

elements of criminality. Consequently, it appears that the physical concealment in New York is not the offense prescribed by the statute, but that the failure to reveal to the trustee in New Jersey after bankruptcy is the very conduct within the prohibition of the law. The instant case maintains that there was not a concealment in New Jersey, since the property had never been there, and that the existence of a separate provision in the statute, 30 Stat. 554 § 29b cl. 2, aimed at false swearing, shows the legislative intention to differentiate the crimes, so that false swearing of itself cannot constitute concealment. Neither of these positions appears defensible; the first, because of the analogy of those cases in which a man has been convicted of crime without ever entering the jurisdiction, *Burton* v. *United States* (1906) 202 U. S. 344, 381, 26 Sup. Ct. 688; *Lamar* v. *United States* (1916) 240 U. S. 60, 36 Fed. 535, the second because the provision against false swearing applies not only to a possible concealment, but to all proceedings in bankruptcy. Furthermore, the decision in the principal case would allow a conviction against the bankrupt in every state where he held property which he had fraudulently failed to include in his schedule. Consequently, the case as a whole would seem to be an unfortunate limitation on the power of the courts in bankruptcy proceedings.

Constitutional Law—Initiative—Power of Courts to Enjoin.—The plaintiff sought an injunction to restrain the secretary of state from filing an initiative bill on the ground that the preamble was argumentative, in evasion of the provisions of the statute. *Held,* five judges to four, the injunction should issue. *State ex rel. Berry* v. *Superior Court* (Wash. 1916) 159 Pac. 92. See Notes, p. 590.

Contracts — Effect of War — Enemy Belligerents. — The defendants, a German firm, were the agents of the plaintiffs, a British firm, for the sale of the plaintiffs' products on the Continent. Plaintiffs claim a declaration that the contract of agency was terminated by the war. *Held,* as the contract involves a continuous relation on both sides, it is dissolved by the war. *Distington Hematite Iron Co., Ltd.,* v. *Possehl & Co.* [1916] 1 K. B. 811. See Notes, p. 588.

Corporations—Stock Dividend—Right of Directors to Rescind.—The directors of the defendant corporation declared a stock dividend, which they later rescinded. The plaintiff, a stockholder, sued the company for his share of the stock dividend, or its value. *Held,* the action fails. *Staats* v. *Biograph Co.* (C. C. A. 2nd Cir. 1916) 55 N. Y. L. J. 1327. See Notes, p. 599.

Criminal Law—Instruction—Province of Court and Jury.—In a trial for homicide, a killing with a deadly weapon was proved and there was no evidence in the case tending to show a lack of malice. The trial court charged the jury that if they believed the evidence beyond a reasonable doubt, they must find the defendant guilty of murder. *Held,* Mayfield, J., dissenting, that the charge was proper, since all the material facts of the case for the prosecution were clearly established, malice being presumed from the use of a deadly weapon, in the absence of evidence of justification or excuse. *Warren* v. *State* (Ala. 1916) 72 So. 624. See Notes, p. 594.

DIVORCE—FRAUD—EFFECT OF PRENUPTIAL MISCONDUCT OF HUSBAND AND WIFE.—The plaintiff, having had intercourse with the defendant, was induced to marry her on her representation that she was pregnant by him. Ascertaining that her pregnancy was due to her relations with a third party, the plaintiff sued for divorce on the ground of fraud. *Held,* he is entitled to the relief sought. *Lyman* v. *Lyman* (Conn. 1916) 97 Atl. 312.

If either party to the marriage contract is guilty of a fraud which goes to any of the essentials of the marriage relationship, the contract will be set aside either by annulment or divorce, according to the jurisdiction. *Reynolds* v. *Reynolds* (1862) 85 Mass. 605; *Carris* v. *Carris* (1873) 24 N. J. Eq. 516; see opinion of Hamersley, J. in *Gould* v. *Gould* (1905) 78 Conn. 242, 261, 61 Atl. 604. Prenuptial unchastity, in the absence of a statute to the contrary, has not in general been held to entitle the husband to a decree on the ground of fraud. *Varney* v. *Varney* (1881) 52 Wis. 120, 8 N. W. 739; *Leavitt* v. *Leavitt* (1865) 13 Mich. 452. Prenuptial pregnancy by another man is regarded as so damaging the status intended by marriage that the husband will be given the relief he asks, *Reynolds* v. *Reynolds, supra; Baker* v. *Baker* (1859) 13 Cal. 88; *contra, Long* v. *Long* (1877) 77 N. C. 304, except where he has himself had intercourse with his wife before marriage. Where this is the case, regardless of whether the wife's pregnancy induced the marriage or became known subsequent to it, the weight of authority denies the decree. *Scroggins* v. *Scroggins* (1832) 14 N. C. 535; *Safford* v. *Safford* (Mass. 1916) 113 N. E. 181, either on the ground that, being apprised of the wife's character, the husband is put on inquiry and cannot complain of her condition, *Franke* v. *Franke* (Cal. 1892) 31 Pac. 570; *Seilheimer* v. *Seilheimer* (1885) 40 N. J. Eq. 412, 2 Atl. 376, or on the ground that he does not come into court with clean hands. *States* v. *States* (1883) 37 N. J. Eq. 195. Both of these positions appear untenable, the first because the facts are peculiarly within the knowledge of the defrauding wife, the second because the plaintiff's misconduct has no direct relation to the fraud of which he complains, 1 Pomeroy, Eq. Jur. (3rd ed.) § 399. The introduction of the spurious child into the marriage status raises another practical objection to the proposition, and makes it appear that the instant case meets admirably the requirements of law and expediency. There is some authority to support the view. *Wallace* v. *Wallace* (1908) 137 Ia. 37, 114 N. W. 527; see *Sissung* v. *Sissung* (1887) 65 Mich. 168, 31 N. W. 770.

EMINENT DOMAIN—RIGHT TO RECOVER FOR GENERAL DAMAGE TO REMAINING LAND.—In an action to condemn a portion of the defendant's land, *held,* though adjacent landowners can recover special damages only, still the defendant can recover general damages to his remaining land, since, considered as having freedom of contract, he may include such damages in the purchase price of the land actually taken. *Lewisburg & Northern R. R.* v. *Hines* (Tenn. 1916) 183 S. W. 985.

General damages are those which a landowner suffers in common with the general public or with the community collectively, and special damages those which affect an individual's property in a peculiar manner different in kind from that suffered by others. See *Little Rock etc. R. R.* v. *Newman* (1904) 73 Ark. 1, 83 S. W. 653. The prevailing tendency is to limit the amount of recovery of an adjacent landowner to such special damages as he has sustained, for general damage

to his property is *damnum absque injuria,* either because the public utility is making such reasonable use of its property as an individual owner could without unduly injuring his neighbors, or because a public nuisance has been created, of which the state alone can complain. *Hyde* v. *Minnesota etc. Ry.* (1912) 29 S. D. 220, 136 N. W. 92; *Smith* v. *St. Paul etc. Ry.* (1905) 39 Wash. 355, 81 Pac. 840. On principle, there seems to be no reason for limiting this doctrine to land no part of which is taken, and, accordingly, many courts have refused to allow compensation for general damages to remaining land where part is taken. *Lavelle* v. *Town of Julesburg* (1911) 49 Colo. 290, 112 Pac. 774; *Missouri etc. R. R.* v. *Harris* (Mo. 1915) 181 S. W. 34; but see *Raleigh etc. Ry.* v. *Mecklenburg Mfg. Co.* (N. C. 1915) 85 S. E. 390. If the decision of the principal case is to be supported at all, the true ground would be that payment of all damages is a condition of the delegation to the plaintiff of the right to exercise eminent domain. See *Raleigh etc. Ry.* v. *Mecklenburg Mfg. Co., supra.* The exercise of eminent domain is a taking of private property by the supreme authority and without the landowner's consent, 1 Lewis, Eminent Domain, § 1, and hence the theory of freedom of contract is obviously an unsupportable fiction.

Employers' Liability Insurance—Insurer Liable for Amount in Excess of the Face of the Policy.—An employee of the plaintiff offered to settle his claims against the plaintiff for less than the face of the latter's liability policy, but the defendant insurance company refused to settle unless the plaintiff should pay half the amount. The plaintiff refused, and the employee, as anticipated by the defendant, recovered from the plaintiff a sum in excess of the policy. The defendant paid the amount of the policy and the plaintiff now sues for the excess recovered by the employee. *Held,* the insurer is liable, because of the attempted coercion, for the excess over the amount of the policy. *Brown & McCabe* v. *London Guarantee & Accident Co.* (D. C. Ore. 1915) 232 Fed. 298.

The rights and duties of insurance companies are generally determined by the contracts between the parties. *Rumford Falls Paper Co.* v. *Fidelity & Casualty Co.* (1899) 92 Me. 574, 43 Atl. 503. Policies insuring against an employer's liability include in the main stipulations by which the insurer agrees either to settle or to defend any suits brought against the employer. Richards, Insurance (3rd ed.) § 482. Where the choice between settlement and defense is exercised in good faith and the insurer refuses to settle, he is not liable to the insured in excess of the policy, even when the judgment secured by the employee is for a greater sum then the amount of the policy and the proposed settlement, *Schmidt* v. *Travelers Ins. Co.* (1914) 244 Pa. 286, 90 Atl. 653, for such a liability would be in contravention of the terms of the contract between the parties. *Rumford Falls Paper Co.* v. *Fidelity & Casualty Co., supra.* The insurer is not, under such circumstances, in any sense the agent of the insured. *Wisconsin Zinc Co.* v. *Fidelity & Deposit Co.* (1916) 162 Wis. 39, 155 N. W. 1081. Where the choice is not exercised in good faith, it might be argued that the terms of the contract still protect the insurer from liability beyond the amount of the policy. But see *Wisconsin Zinc Co.* v. *Fidelity & Deposit Co., supra.* Where the policy binds the insurance company to defend or settle as it deems advisable, a refusal to settle, though deemed advisable, might on a meticulous construction of the

contract constitute an actionable breach. A more liberal view, not sanctioned by direct authority on the point, would support recovery on the ground of an implied promise to use all legitimate means to hold the insured harmless. See *Brassil* v. *Maryland Casualty Co.* (1914) 210 N. Y. 235, 104 N. W. 622.

EXECUTORS AND ADMINISTRATORS—TRUSTEES—DOUBLE COMMISSIONS.—A will imposed trust duties on the executors, who divided the estate, dealing with the real estate as executors and with the personal estate as trustees and, on accounting sought to charge the estate with double commissions. *Held,* since no authority to so divide the estate was found in the will, double commissions should not be allowed. *In re Ziegler* (N. Y. Ct. of App. 1916) 113 N. E. 553, affirming the opinion of the Appellate Division (1915) 168 App. Div. 735; 154 N. Y. Supp. 652.

The opinion of the lower court was approved and the principles involved therein were discussed in 16 Columbia Law Rev. 72.

GIFTS—DONOR'S OWN NOTE INVALID AS GIFT *Inter Vivos* OR *Mortis Causa.*—The donor, while suffering from an incurable malady, "for value received" signed and gave two promissory notes payable on demand, to his daughters. Upon the question whether the executors might pay out of the estate the amounts of the notes as debts or gifts *mortis causa, held,* the gift of the donor's own note cannot be effectual either as a gift *inter vivos* or *mortis causa. In re Leaper* (1916) 1 Ch. 579.

An essential element of a gift, whether *inter vivos,* or *mortis causa,* is the delivery of the subject matter of the donation, Brantly, Pers. Prop., §§ 184, 205. Thus it is settled law that the donor's own promissory note cannot be the subject of a gift *inter vivos* and will not support an action, either at law or in equity against the donor or his estate. *Arnold* v. *Franklin* (1878) 3 Ill. App. 141; *Raymond* v. *Sellick* (1835) 10 Conn. 480. It cannot be enforced as a note or contractual obligation because it is not founded on a consideration, which defense is open to the donor or his representative; nor is it effectual because the donor does not part with dominion over the money which is the real subject of the attempted, or rather promised, gift. *DeGrange* v. *DeGrange* (1903) 96 Md. 609, 613, 54 Atl. 663; *Graf* v. *Graf* (1912) 150 Ky. 226, 150 S. W. 58; *Parish* v. *Stone* (1833) 31 Mass. 198; see *Harris* v. *Clark* (1849) 3 N. Y. 93, 113. Nor can such a gift be supported as a *donatio mortis causa* because it tends to subvert the statute of wills, *Tracy* v. *Alvord* (1897) 118 Cal. 654, 50 Pac. 757; *Phelps* v. *Phelps* (N. Y. 1858) 28 Barb. 121, 152, and also is a mere unexecuted promise to make a gift in the future, wanting the essential requisite of actual delivery. *Parish* v. *Stone, supra*; *Smith* v. *Kittridge* (1849) 21 Vt. 238. See 5 Columbia Law Rev. 331 as to the validity of a cheque as the subject of a gift *mortis causa.*

HUSBAND AND WIFE—ACTIONS BETWEEN HUSBAND AND WIFE—TORT.—A state statute provided that married women shall have the right "to sue and be sued, and in law and equity shall enjoy all rights and be subjected to all laws" as though single. *Held,* under this statute, a married woman may maintain an action against her husband in tort. *Fitzpatrick* v. *Owens* (Ark. 1916) 186 S. W. 832.

At common law neither party to the marriage relation could sue the other. The objection to such an action was not procedural but was based on the theory of the unity of husband and wife, which negatived the inception of such a cause of action. *Phillips* v. *Barnet* (1876) 1 Q. B. D. 436; *Abbott* v. *Abbott* (1877) 67 Me. 304. The Married Women's Acts removing disabilities have resulted in various holdings in this country. Some of the statutes, plainly limited in scope, apply only to property and contractual rights. *Peters* v. *Peters* (1875) 42 Iowa 182; *Libby* v. *Berry* (1883) 74 Me. 286; *Bandfield* v. *Bandfield* (1898) 117 Mich. 80, 75 N. W. 287. Others merely remove the disabilities militating against equality between husband and wife and therefore give the wife no right of action against the husband in tort. *Strom* v. *Strom* (1906) 98 Minn. 427, 107 N. W. 1047; *Schultz* v. *Christopher* (1911) 65 Wash. 496, 118 Pac. 629. Under a third class of statutes, broadly framed, as in the principal case, some courts have held that, in view of the long established common law rule, and the demands of public policy, such a right of action will not be afforded unless given expressly or by necessary implication. *Longendyke* v. *Longendyke* (1863) 44 Barb. 366; *Thompson* v. *Thompson* (1910) 218 U. S. 611, 31 Sup. Ct. 111; *Rogers* v. *Rogers* (1915) 265 Mo. 200, 177 S. W. 282. These decisions would seem necessarily based on the theory that the statutes leave the status of husband and wife unchanged and merely provide exceptions to the consequence of said status. A few jurisdictions, adopting a more liberal attitude, allow a tort action either because the statutes expressly so provide, *Fiedler* v. *Fiedler* (1914) 42 Okla. 124, 140 Pac. 1022; *Gilman* v. *Gilman* (N. H. 1915) 95 Atl. 657; see dissent in *Thompson* v. *Thompson, supra,* and see *Sykes* v. *Speer* (Tex. Civ. App. 1908) 112 S. W. 422, or because the right of action necessarily follows from the establishment of the separate legal entity. *Brown* v. *Brown* (1914) 88 Conn. 42, 89 Atl. 889. Such a result seems correct, for it is difficult to perceive why a tort action is more subversive of public morals than divorce suits and criminal proceedings, which are universally allowed. *Fiedler* v. *Fiedler, supra*; *Gilman* v. *Gilman, supra*; *Sykes* v. *Speer, supra.*

Husband and Wife—Wife's Separate Estate—When Liable for Debts of Husband.—A married woman invested her money in business which her husband managed as his own and in his name, though he had nothing invested. He received no salary, but the family lived on the proceeds of the business, which prospered exceedingly under his management. *Held,* the assets of this business may in equity be attached for the husband's debts. *Strong* v. *Bueschner* (Ohio, Cuyahoga Common Pleas, 1916) 51 Oh. Law Bull. 359.

Modern statutes have removed the property of married women from the power of their husbands or his creditors. N. Y. Laws of 1909, c. 19, § 51, and similar statutes. Obviously, when the husband borrows or receives money from his wife with which to open his own business, it becomes his property, and is liable for his debts, *Woodward* v. *Felts* (1891) 35 N. Y. St. Rep. 520, 13 N. Y. Supp. 111; *Wortman* v. *Price* (1868) 47 Ill. 22, but where the husband is openly the *bona fide* agent of the wife, the courts are unanimous in protecting her property from his creditors. *Dean* v. *Bailey* (1869) 50 Ill. 481; *Catlett* v. *Alsop etc. Co.* (1901) 99 Va. 680, 40 S. E. 34; *Deere etc. Co.* v. *Bonne* (1899) 108 Iowa 281, 79 N. W. 59. If, as in the principal case, the

agency of the husband is undisclosed, the majority of courts refuse to subject the assets of the wife's business to the husband's debts, *Aldridge* v. *Muirhead* (1879) 101 U. S. 397; *Gage* v. *Dauchy* (1866) 34 N. Y. 293; *Parker* v. *Bates* (1883) 29 Kan. 597; *Dean* v. *Bailey, supra*; *contra, Glidden* v. *Taylor* (1866) 16 Oh. St. 509; *Patton's Ex'r.* v. *Smith* (1908) 130 Ky. 819, 114 S. W. 315, unless fraud be present. *Hyde* v. *Frey* (1886) 28 Fed. 819; *Spering* v. *Laughlin* (1886) 113 Pa. 209, 6 Atl. 54; *Lachman* v. *Martin* (1891) 139 Ill. 450, 28 N. E. 795. Reason, furthermore, coincides with authority, for neither the fact that the husband contributed his time and skill, nor that the profits were enormous, would obviate the objection that an agent, disclosed or undisclosed, who produces profits from another's enterprise acquires thereby no property in such business. *Buckley* v. *Wells* (1865) 33 N. Y. 518; *Parker* v. *Bates, supra.* If, in the contemplation of the parties, the wife's money and the husband's skill and labor were to be the assets of a partnership, still the husband's individual creditors could reach only his share of such assets. 1 Rowley, Partnership § 536; *Lovins* v. *Laub* (1914) 85 Misc. 336, 147 N. Y. Supp. 304. The difficulty met by the questionable decision of the principal case could be solved by the adoption of statutes similar to that in force in Massachusetts, providing that a married women, engaged in business, must file a certificate stating that fact, else such business will be liable for her husband's debts. Mass. Rev. Laws c. 153 § 10.

International Law—Prize Courts—Orders in Council.—A British order in council authorized the crown to requisition before trial any ship or cargo detained as prize. *Held,* reversing an order of the Prize Court [1916] P. 27, the order was illegal because it was contrary to international law. *The Zamora* [P. C. 1916] 2 A. C. 77.

Though prize courts often speak of themselves as administering international law, and not the law of the country in which they sit, *The Maria* (1799) 1 C. Rob. *340, *350, *351; *The Marie Glaeser* (1914) P. 218, 233; but see 2 Oppenheim, International Law (2nd ed.) 553, 554, it is universally recognized that they are bound by the rules of their own government. See *The Santa Cruz* (1798) 1 C. Rob. *50, *62; Wheaton, International Law (8th ed.) 25n., 483n., § 396. The instant case is the first which decides whether orders of the king in council are binding "rules" in this sense. It had been claimed that they were, Westlake in 22 Law. Q. Rev. 14, 24; *contra,* 3 Phillimore, International Law (3rd ed.) § 436, on an assumed historical analogy between the legislative power of the crown over courts of prize and that of parliament over the courts of common law. *The Fox* (1811) Edw. *311. The lower court in the principal case inclined to this view, but held that, at any rate, an order in council is presumed to be valid unless it clearly violates international law. See *The Fox, supra.* If this were so, an order could never be invalidated in a prize court, for there is scarcely any principle of international law of such immemorial standing that there is not some contrary authority. The Privy Council expressly repudiates the existence of any such presumption. In holding that only acts of parliament are controlling, the instant decision is of great value to the law of nations, since the legislative arm of the government, which has no direct connection with military affairs, is under less temptation than the executive to subordinate law to necessity.

INTERNATIONAL LAW—SEQUESTRATION OF PRIZES IN NEUTRAL PORTS.—The British steamship Appam, captured by the German cruiser Moewe, was sent into an American port in charge of a prize master who sought to intern her under the Treaty with Prussia of 1799, which provided that the war vessels of either party could carry prizes into the ports of the other without being subject to legal process. *Held,* the request for internment should be denied and restitution to the British claimant decreed, as the Treaty applied only to prizes brought in by war vessels and not those coming in alone, and by the rules of international law sequestration of prizes in neutral ports is not allowed. *The Appam* (D. C. E. D. Va. 1916) 234 Fed. 389. See Notes, p. 585.

LANDLORD AND TENANT—IMPLIED COVENANT OF FITNESS FOR THE PURPOSE FOR WHICH PREMISES ARE LEASED.—The plaintiff, a subtenant, leased from the defendant a moving picture theatre together with its chairs, piano, and machines. He later discovered that the heating plant, which was solely in his control, was inadequate. As a result his patronage decreased and he surrendered the premises and sued for losses sustained. *Held,* there was an implied warranty or condition that the theatre was fit for immediate occupation and use for the purpose for which it was rented. *Davey* v. *Christoff* (1916) 36 Ont. L. R. 123.

Undoubtedly the general rule is that in the lease of real estate there is no implied covenant or warranty that the premises are reasonably fit for the purpose for which they are rented. *Davis* v. *George* (1893) 67 N. H. 393, 39 Atl. 979; *Scheffler Press* v. *Perlman* (1909) 130 App. Div. 576, 115 N. Y. Supp. 40; *Valin* v. *Jewell* (1914) 88 Conn. 151, 90 Atl. 36; see *Hart* v. *Rogers* [1916] 2 K. B. 646; *contra, Thompson* v. *Walker* (1909) 6 Ga. App. 80, 64 S. E. 336. Even a covenant restricting the lessee to a specified use of the leased property will not change this rule. *Lyons* v. *Gavin* (1904) 43 Misc. 659, 88 N. Y. Supp. 252; but see *Hunter* v. *Porter* (1904) 10 Idaho 72, 77 Pac. 434. The lessee takes an estate and not merely a right to use, and the doctrine of *caveat emptor* applies. *Valin* v. *Jewell, supra*; *see Viterbo* v. *Friedlander* (1887) 120 U. S. 707, 7 Sup. Ct. 962. If, however, a furnished house is leased for a short term, a covenant of reasonable fitness for occupancy at the time the term commences will be implied, *Smith* v. *Marrable* (1843) 11 M. & W. *5; *Morgenthau* v. *Ehrich* (1912) 77 Misc. 139, 136 N. Y. Supp. 140, but there is no implied covenant of continued fitness. *Sarson* v. *Roberts* [1895] 2 Q. B. 395. The basis for this distinction in favor of the lessee of a furnished house is that the covenant is really as to the condition of the furniture, and hence the real property rule does not apply. *Sutton* v. *Temple* (1843) 12 M. & W. *52. In isolated cases, however, the rule has been extended so as to include the condition of the realty where a defective drain, *Wilson* v. *Finch-Hatton* (1877) 46 L. J., Ex. 489, or the presence of a contagious disease, *Bird* v. *Lord Greville* (1884) 1 Cab. & E. 317, render the furnished premises dangerous for human habitation. The principal case follows the furnished house authorities, and, though seemingly extending them, *Davis* v. *George, supra*; *Chester* v. *Powell* (1885) 52 L. T. 722, is commendable as protecting a tenant from an unreasonable or careless landlord.

Landlord and Tenant—Personal Injury to Tenant—Breach of Covenant to Repair.—The plaintiff sued his landlord in tort for personal injuries due to the latter's breach of his covenant to repair. *Held,* the landlord's breach of covenant does not make him liable in tort. *Kohnle* v. *Paxton* (Mo. 1916) 188 S. W. 155.

On the same state of facts, *held,* the landlord is liable in tort for his negligence in failing to repair. *Robinson* v. *Heil* (Md. 1916) 98 Atl. 195. See Notes, p. 593.

Master and Servant—Workmen's Compensation—Both Special and General Master Liable.—The defendants were makers of brick, and Dale was their teamster. The defendants hired Dale and a team to one Walsh, a sand dealer, to load sand under the latter's direction and control and to haul it wherever Walsh might indicate, the defendants to pay Dale. The latter was mortally injured by a slide of sand while he was shoveling in Walsh's pit. *Held,* under the Workmen's Compensation Law, the decision of the Commission that Dale was in the employ of the defendants is binding, and his widow may recover against them. *Matter of Dale* v. *Saunders Bros.* (1916) 218 N. Y. 59, 112 N. E. 571.

The common law liability of the master to his servant depends upon negligence by the master in the discharge of some duty he assumes to his servant by virtue of the contractual relation between them. See *Richardson* v. *Babcock etc. Co.* (1 C. C. A. 1910) 175 Fed. 897; 3 Labatt, Master & Servant (2nd ed.) §898; 2 Cooley, Torts (3rd ed.) 1101. Hence at common law the defendants in the instant case would not have been liable, because when the injury occurred Dale was in the employ of a special master, and therefore the defendants could have been guilty of no negligence toward him. *Rourke* v. *Colliery Co.* (1877) 2 C. P. D. 205; *Westover v. Hoover* (1911) 88 Neb. 201, 129 N. W. 285; *Wolfe* v. *Mosler Safe Co.* (1900) 139 App. Div. 848, 124 N. Y. Supp. 541; *Coughlan* v. *Cambridge* (1896) 166 Mass. 268, 44 N. E. 218. The court in the principal case abolishes the distinction between special and general master for the purposes of recovery under the Compensation Law, and allows a recovery against either. The decision is revolutionary, but can be justified. The law should be construed in the light of the purpose for which it was passed, *Hoenig* v. *Industrial Commission* (1915) 159 Wis. 646, 150 N. W. 996, and since it is highly remedial in character, it should also be construed liberally. *Duluth Brewing Co.* v. *District Court* (1915) 129 Minn. 176, 151 N. W. 912; *Matter of Rheinwald* v. *Builders' Brick etc. Co.* (1915) 168 App. Div. 425, 153 N. Y. Supp. 598; and see *Matter of Moore* v. *Lehigh Valley R. R.* (1915) 169 App. Div. 177, 154 N. Y. Supp. 620. At common law, a servant injured in the temporary employ of a special master could not recover against the general master because the injury could have been due to no fault or negligence of the latter. But the Compensation Law expressly does away with negligence as the basis of recovery, and charges the master with all injuries to his workmen regardless of fault, N. Y. Consol. Laws Ch. 67, §10, on the theory that incapacitated workmen are as much an inherent expense of production as incapacitated machinery. *Matter of Rheinwald* v. *Builders' Brick etc. Co. supra*; Boyd, Workmen's Compensation §§4, 5; and see *Matter of Moore* v. *Lehigh Valley R. R., supra; Ives* v. *South Buffalo Ry.* (1911) 201 N. Y. 271, 294, 94 N. E. 431. That is, whereas at common law the workman recovered damages

for a tort, under the Compensation Law he recovers compensation as a right based on his status. Beven, Workmen's Compensation (4th ed.) 477. And it cannot be denied that, despite Dale's transfer to the employ of a special master, under the liberal construction the law was intended to have, the defendants still remained his employers, so that the status essential to recovery under the Compensation Law existed.

Mines and Minerals—Reservation of Mining Rights—Right of Subjacent Support.—Plaintiff was the grantee of certain land under a deed which reserved all coal. *Held,* plaintiff can recover in trespass for the failure of the grantor's lessee to provide support for the surface while mining the coal, since the plaintiff's acceptance of the reservation in the deed did not constitute a waiver of his right to subjacent support. *Stone Gap Colliery Co.* v. *Hamilton* (Va. 1916) 89 S. E. 305.

Where the ownership of the surface of land is severed from that of the mineral under it, the general rule, in the absence of restriction or contract to the contrary, is that mining must be so carried on as to preserve the support of the surface, *Jones* v. *Wagner* (1871) 66 Pa. 429; Costigan, American Mining Law §139, nor does it matter whether the severance arises from a reservation or a grant of the mineral rights. See *Burgner* v. *Humphrey* (1884) 41 Oh. St. 340. This right to subjacent support has been defined as an absolute or proprietary right which exists irrespective of the skill or care used in mining. *Berkey* v. *Berwind-White Coal Mining Co.* (1911) 229 Pa. 417, 78 Atl. 1004. While the owner of the surface may part with this right, like any other right, by his deed or covenant, *Miles* v. *Pa. Coal Co.* (1907) 217 Pa. 449, 66 Atl. 764, the courts are strict in interpreting such waivers and tend to a construction in favor of support. *Piedmont & George's Creek Coal Co.* v. *Kearney* (1911) 114 Md. 496, 79 Atl. 1013; *Walsh* v. *Kansas Fuel Co.* (1914) 91 Kan. 310, 137 Pac. 941; *Robinson* v. *Boynton Coal Co.* (1914) 58 Pa. Super. Ct. 176. A grant of "all" the coal underlying the tract has been generally held insufficient to make out such a waiver. *Burgner* v. *Humphrey, supra; Seitz* v. *Coal Valley Mining Co.* (1909) 149 Ill. App. 85. The contrary was held in *Griffin* v. *Fairmont Coal Co.* (1905) 59 W. Va. 480, 53 S. E. 24, on the ground that there was an absolute grant in anticipation of a use which would naturally destroy the surface support. But the grantor in the principal case intended to convey the entire use and benefit of the surface, reserving the minerals, and neither he nor his lessee has a right to injure the estate he has granted by destroying the support of the surface. *Collins* v. *Gleason Coal Co.* (1908) 140 Iowa 114, 115 N. W. 497. Hence, the decision seems sound according to either view.

Negligence—Public Entertainment—Liability of Proprietor.—The plaintiff, attending a play at a theatre of which the defendant was manager, was injured by a shot fired from the stage by an actor in a company which had an independent contract with the defendant. In a suit for damages, *held,* the defendant warranted that he would use reasonable care that the plaintiff would not be exposed to danger. *Cox* v. *Coulson* (Ct. of App.) [1916] 2 K. B. 177.

Under a similar state of facts, where the plaintiff was injured in a panic caused by the escape of a lion which was on exhibition, *held,* in a tort action, the defendant is absolutely liable irrespective of negligence. *Stamp* v. *Eighty Sixth Street Amusement Co.* (Sup. Ct., App. Term, 1st Dept., 1916) 95 Misc. 599, 159 N. Y. Supp. 683.

Whether the action be brought in tort or contract, it is settled by the weight of authority that the proprietor of an entertainment to which the public is invited is subject to the duty, or assumes the obligation, to use reasonable care that no act will be done which will result in conditions dangerous to persons in the audience. *Thompson* v. *Lowell etc. St. Ry.* (1898) 170 Mass. 577, 49 N. E. 913; *Williams* v. *Mineral City Park Assoc.* (1905) 128 Iowa 32, 102 N. W. 783; *Dietze* v. *Riverview Park Co.* (1913) 181 Ill. App. 357. Moreover, as the first principal case holds, the fact that the entertainment may be given by an independent contractor, and not by the proprietor directly, does not in any degree relieve the latter of his duty or obligation to use due care, *Thompson* v. *Lowell etc. St. Ry., supra*; *Sebeck* v. *Plattdeutsche Volkfest Verein* (1900) 64 N. J. L. 624, 46 Atl. 631, although, of course, it is only his own negligence, and not that of the independent contractor, for which he is ordinarily responsible. *Thomas* v. *Springer* (1909) 134 App. Div. 640, 119 N. Y. Supp. 460. While one who, appreciating the danger, attends a form of amusement where there is necessarily some risk, may be said to assume such risk, *Wells* v. *Minneapolis Baseball etc. Assoc.* (1913) 122 Minn. 327, 142 N. W. 706; but *cf. Thompson* v. *Lowell etc. St. Ry., supra,* the amount of care which the proprietor is bound to exercise is naturally dependent upon the nature of the production, *cf. King* v. *Ringling* (1910) 145 Mo. App. 285, 130 S. W. 482, and where, as in the second principal case, the entertainment is an exhibition of wild animals, a very high degree of care is required of the defendant, if, indeed, he is not an absolute insurer of the safety of the audience. *Filburn* v. *People's Palace etc. Co.* (1890) 25 Q. B. D. 258; *cf. Parker* v. *Cushman* (8 C. C. A. 1912) 195 Fed. 715.

Officers—Partnership—Agreement to Divide Salary.—Upon the election of the plaintiff as sheriff, the parties, who for many years had been partners in farming, agreed that the defendant should continue on the farm and that the plaintiff should act as sheriff, the expenses of both employments to be borne by the partnership and the profits to be pooled together and divided equally. In a suit arising under the agreement, *held,* such an agreement is not invalid as against public policy, or as a violation of the code provision prohibiting the selling or letting to farm of a public office. *Shinn* v. *Shinn* (W. Va. 1916) 88 S. E. 610.

It is generally accepted that an assignment of unearned wages by a public officer is void as against public policy. *Bliss* v. *Lawrence* (1874) 58 N. Y. 442; *Schmitt* v. *Dooling* (1911) 145 Ky. 240, 140 S. W. 197; *Schwenk* v. *Wyckoff* (1890) 46 N. J. Eq. 560, 20 Atl. 259; *contra, State ex rel. State Bank* v. *Hastings* (1862) 15 Wis. 83; *Brackett* v. *Blake* (1844) 48 Mass. 335. It is deemed essential to efficient public service that there be no speculation on public offices and that the officers themselves receive, for their own use, and at such times as the law has appointed, the fund provided for their maintenance. *Bliss* v. *Lawrence, supra.* This seems sound, for whether or no an agreement is against public policy is to be determined from its purpose and tendency and not from the results of the particular agreement under discussion. *Anderson* v. *Branstrom* (1912) 173 Mich. 157, 139 N. W. 40; *Brown* v. *Bank* (1894) 137 Ind. 655, 37 N. E. 158. Yet courts, admitting this, have attempted to distinguish between assignments of unearned wages and partner-

ship agreements, such as in the instant case, on the ground that in the latter the officer does not anticipate his pay but merely provides as to its application when earned. *Thruston* v. *Fairman* (N. Y. 1877) 9 Hun 584; *McGregor* v. *McGregor* (1902) 130 Mich. 505, 90 N. W. 284; *Sterry* v. *Clifton* (1850) 9 C. B. 109; *contra, Anderson* v. *Branstrom, supra*; see *Santleben* v. *Froboese* (1897) 17 Tex. Civ. App. 626, 43 S. W. 571. It is true that such a partnership agreement does not technically fall within statutes similar to the one in the instant case. But since, as regards public policy, the test of the validity of an agreement rests on its tendency to injure public interests, it is difficult to see why such an agreement, if enforced, would not in effect, be open to the same objections as are advanced against assignments. Such agreements would open the door for speculation on public offices under the guise of the partnership, and, like assignments, would tend to impair the efficiency of public officials. *Anderson* v. *Branstrom, supra*; see *Santleben* v. *Froboese, supra.*

Public Service Companies—Water Company—Duty to Install Service Pipes.—The defendant was chartered "to send and distribute water throughout the said city" and "to lay pipes for conducting its water and to make excavations through any of the streets". A maximum rate was provided. *Held,* a mandamus will not issue to compel the defendant, at its own expense, to supply the plaintiff, a consumer, with service pipes from the defendant's main to the plaintiff's property line. *Birmingham Water Works Co.* v. *Hernandez* (Ala. 1916) 71 So. 443.

The question of whether the company or consumer shall bear the expense of installing lateral pipes is governed where possible by the franchise, contract or ordinances involved. Where the court can ascertain that the company's rate charge was established on a computation of expenses which did not include the laying of laterals, the consumer should be made to bear the cost. See *Cleveland* v. *Malden Water Works Co.* (1912) 69 Wash. 541, 125 Pac. 769; *Fisher* v. *St. Joseph Water Co.* (1910) 151 Mo. App. 530, 132 S. W. 288. In the absence of any such controlling factors, it is argued that the laterals are not a part of the general facilities of the water system, but are peculiarly for the benefit of the consumer and should be installed by him. *City of Wichita* v. *Wichita Water Co.* (8th C. C. A. 1915) 222 Fed. 789. In many of the cases where the duty has been laid on the company, the courts have implied the obligation either because the rate allowed was deemed to cover such items, *State* v. *Water Supply Co.* (1914) 19 N. M. 36, 140 Pac. 1059, or because the consumer was excluded from excavating in the streets, *Bothwell* v. *Consumers' Co.* (1907) 13 Idaho 568, 92 Pac. 533, or else because the connecting pipes were deemed part of the system which the company was bound to maintain. *International Water Co.* v. *El Paso* (1908) 51 Tex. Civ. App. 321, 112 S. W. 816. While all of the reasons advanced are not conclusive, since abutting land owners may excavate, subject to reasonable municipal regulations, *McClaugherty* v. *Water Co.* (1910) 67 W. Va. 285, 68 S. E. 28, 3 McQuillin, Municipal Corporations 1343, and will have a property right in the pipes laid by them, *Jackson* v. *City of Ellendale* (1894) 4 N. D. 478, 61 N. W. 1030; *Mulrooney* v. *Obear* (1903) 171 Mo. 613, 71 S. W. 1019, yet in the absence of any controlling circumstances to the contrary, it would seem just to put the burden on the water company. The

company is under a duty to supply water to the consumer, and this is not accomplished until the water is brought to the latter's property. The prescribed charge would seem to be for water delivered, rather than a fee permitting the consumer to tap the company's main. *Cleveland* v. *Malden Water Works Co., supra.*

RECEIVERS—FEES OF RECEIVER—PRIORITY.—The defendant's property was sold in foreclosure of receiver's certificates which were a first lien on its assets. *Held,* in the distribution of the proceeds, the receiver's fees and expenses have priority over the certificates. *Jeffers* v. *New Jersey & P. Ry.* (N. J. Eq. 1916) 97 Atl. 32.

The rule is that the compensation of a receiver is a charge on the funds which may come into his hands, *Beckwith* v. *Carroll* (1876) 56 Ala. 12; *Hopfensack* v. *Hopfensack* (N. Y. 1880) 61 How. Pr. 498; see *Garniss* v. *Superior Ct.* (1891) 88 Cal. 413, 26 Pac. 351, and therefore he is entitled to full payment of the expenses of the receivership, including payment for his own services, regardless of the ability of the estate to discharge its other incumbrances. *In re Glasdir Copper Mines* [1906] 1 Ch. 365; *Chesapeake & O. Ry.* v. *Atl. etc. Co.* (1901) 62 N. J. Eq. 751, 48 Atl. 997; but *cf. Nessler* v. *Industrial Land Co.* (1903) 65 N. J. Eq. 491, 56 Atl. 711, reversed on other grounds (1906) 70 N. J. Eq. 804, 64 Atl. 109. Various reasons are assigned for the rule. The principal case goes on the theory that it is one of necessity, because otherwise men will not be willing to undertake the administration of estates in litigation. See *Espuella Land etc. Co.* v. *Bindle* (1895) 11 Tex. Civ. App. 262, 32 S. W. 582. The reason more generally given is that a receiver is an officer of the court, and therefore his compensation is part of the costs of the suit in which he is appointed. *Wilson Cotton Mills* v. *Randleman Cotton Mills* (1894) 115 N. C. 475, 20 S. E. 770; *Espuella Land etc. Co.* v. *Bindle, supra;* Alderson, Receivers §632. Thus it has been held that, even when the order appointing a receiver is reversed on appeal, the receiver is still entitled to remuneration out of the funds in his hands, *Espuella Land etc. Co.* v. *Bindle, supra;* see *Cutter* v. *Pollock* (1898) 7 N. D. 631, 76 N. W. 235, though the better considered cases make the receiver in such instances look to the complainant for compensation. *McAnrow* v. *Martin* (1899) 183 Ill. 467, 56 N. E. 168; *Couper* v. *Shirley* (9 C. C. A. 1896) 75 Fed. 168. The rule, however, is well settled, and the principal case is correct in holding that the receiver's right to reimbursement takes priority even over receiver's certificates whose repayment is, under an order of the court, to take priority over all other debts whatsoever. *Strapp* v. *Bull, Sons & Co.* [1895] 2 Ch. 1; *In re Boynton* [1910] 1 Ch. 519; *Petersburgh Sav. etc. Co.* v. *Dellatorre* (5 C. C. A. 1895) 70 Fed. 643.

STATUTES—NEUTRALITY LAWS—WHAT CONSTITUTES A MILITARY EXPEDITION OR ENTERPRISE.—The defendants in New York, planning to destroy the Welland Canal which was being used by the British government for transporting military forces and supplies, procured the necessary explosives and started two of their number on the way to Canada. *Held,* under the Criminal Code (Act March 4th, 1909 c. 321) § 13, 35 Stat. 1090, providing that "whoever within the territory or jurisdiction of the United States, begins or sets on foot or provides or prepares the means for any military expedition or enterprise to be carried on from thence against the territory or dominions of any for-

eign prince or state . . . with whom the United States are at peace", shall be fined or imprisoned, the defendants were guilty of setting on foot a military expedition. *United States* v. *Tauscher* (D. C., S. D., N. Y. 1916) 233 Fed. 597.

A few of the interpretations of this statute incline to the following rigid criteria for the identification of a military expedition: military organization, definite leadership, appropriate equipment, and a hostile intent, and do not seem to recognize any distinction between military "expedition" and "enterprise". *United States* v. *Pena* (D. C. 1895) 69 Fed. 983; *United States* v. *Hart* (C. C. 1896) 74 Fed. 724. "Enterprise" however is a broader, more comprehensive term warranting a corresponding amplitude in interpretation. See *Wiborg* v. *United States* (1896) 163 U. S. 632, 650, 16 Sup. Ct. 1127. And therefore decisions which hold that the elements mentioned give character to, rather than identify, an expedition, seem considerably more in harmony with the spirit of the statute. *United States* v. *Ybanez* (C. C. 1892) 53 Fed. 536; *United States* v. *Murphy* (D. C. 1898) 84 Fed. 609; *Wiborg* v. *United States, supra.* The principal case demonstrates the inadequacy of rigid interpretation, especially under modern exigencies, and approaches a basis of identification fundamentally sound. Considering the purpose and spirit of neutrality laws, it would seem that hostile intent, apparent ability to consummate this intent, and an overt act towards consummation, should suffice to define a military expedition or enterprise.

Stock and Stockbrokers—Following Trust Funds—Presumption as to Stock in Broker's Possession.—The defendants, bankrupt brokers, bought shares of stock for the plaintiff and others, but, at the time of bankruptcy, did not hold enough stock to cover all the purchases. Plaintiff, though he could not identify the certificates of stock in the defendants' possession, claimed that such stock should be allotted *pro rata* among the customers. *Held,* Pitney and Hughes, JJ., dissenting, though the shares are not the identical ones purchased for any such customers, they should be allotted *pro rata. Duel* v. *Hollins* (1916) 36 Sup. Ct. 516.

In reversing the decree of the Circuit Court of Appeals and affirming that of the District Court, the Supreme Court, acting on equitable principles, has materially increased the rights of customers of bankrupt brokers. It extends the presumption, taking the place of actual identification, which formerly existed only when the broker had enough stock to meet all claims, to cases where the stock in his possession is insufficient for that purpose. For a discussion of the principles involved agreeing with the result reached by the Supreme Court, see 16 Columbia Law Rev. 48.

Taxation—Transfer Tax Law—Future Profits too Remote to be Taxable.—The partnership agreement between the decedent and his two sons provided that on the death of one partner, the survivors should have the option to continue the partnership until its expiration by the time limit. The decedent's investment was to remain in the firm until its dissolution, and the profits paid to his estate. *Held,* such profits are too remote and speculative to be taxable under the Transfer Tax Law (N. Y. Consol. Laws c. 60 § 220). *In re Borden's Estate* (Surr. Ct., N. Y. Co. 1916) 159 N. Y. Supp. 346.

Prospective profits have frequently been held so reasonably ascertainable as to form a valid element in estimating for various legal

purposes. The valuation of the good will of a business depends on the possibility of forecasting future profits with reasonable certainty from average past profits. *Von Au* v. *Magenheimer* (1908) 126 App. Div. 257, 110 N. Y. Supp. 629. When railroad property is assessed for taxation, its "earnings, prospective as well as present, must form a most important ingredient in the estimation of its value", *Trustees Cincinnati So. Ry.* v. *Guenther* (C. C. 1884) 19 Fed. 395, 400; see *People ex rel. Rome, etc., R. R.* v. *Hicks* (N. Y. 1886) 40 Hun 598, 601, and future earnings may form an element of value in taxing special franchises. 11 Columbia Law Rev. 587. Where one member assumes to dissolve a partnership before the end of the term, the damages recoverable by the other include the loss of probable profits resulting from the breach. *Ramsay* v. *Meade* (1906) 37 Colo. 465, 86 Pac. 1018; *Maguire* v. *Kiesel* (1913) 86 Conn. 453, 85 Atl. 689; see *Zimmerman* v. *Harding* (1913) 227 U. S. 489, 33 Sup. Ct. 387. The same rule has been applied to the breach of a contract, where part of the remuneration was to be future profits. *Dennis* v. *Maxfield* (1865) 92 Mass. 138; see *Zimmerman* v. *Harding, supra.* But where, as in the principal case, by the failure of the survivors to exercise their option the profit may never accrue, obviously the probable future profits cannot be presently taxed. *Matter of Roosevelt* (1894) 143 N. Y. 120, 38 N. E. 281. In such a case, the better holding would be that though the bequest is not presently taxable, the State should yet be allowed to collect its share when the benefits actually come into being, see *Matter of Roosevelt, supra*; *People* v. *McCormick* (1904) 208 Ill. 437, 70 N. E. 350, and on this point the principal case seems wrong.

Taxation—Transfer Taxes—Transfer for Consideration Not Taxable.—The decedent, when forming a partnership with his two sons, had agreed that the interest in the firm name held by any partner who might die, should go to the survivors. *Held,* as this was a transfer by a contract which was made for a valuable consideration, it is not taxable under the Transfer Tax Law (N. Y. Consol. Laws c. 60, § 220). *In re Borden's Estate* (Surr. Ct., N. Y. Co. 1916) 159 N. Y. Supp. 346.

It is elementary that a transfer tax is not a tax on property, but on the right to take property by a particular mode of transfer. The New York statute, which is typical, taxes transfers by will, by intestate law, or "by deed, grant, bargain, sale or gift" when the transfer is intended to take effect in possession or enjoyment at or after the death of the "grantor, vendor, or donor". N. Y. Consol. Laws c 60, § 220. The principal case, following the weight of authority, construes the sections quoted to intend only the taxation of voluntary transfers without consideration. *Herold* v. *Blair* (3 C. C. A. 1908) 158 Fed. 804; *Matter of Heiser* (1913) 85 Misc. 271, 147 N. Y. Supp. 557; *Hagerty* v. *State* (1897) 55 Oh. St. 613, 45 N. E. 1046; *Attorney General* v. *Clark* (Mass. 1915) 110 N. E. 299; *contra, Lacy* v. *State Treasurer* (Iowa 1909) 121 N. W. 179. The reasoning on which these decisions are based is unsatisfactory. The doctrine that the tax, being a special one, must be construed strictly against the government, *Eidman* v. *Martinez* (1902) 184 U. S. 578, 22 Sup. Ct. 515; *Matter of Terry* (1916) 218 N. Y. 218, 112 N. E. 931, has no application, because the language of the statute makes the intent of the legislature so absolutely clear as to leave no room for interpretation. 2 Lewis' Sutherland, Statutory Construction (2nd ed.) § 363. The

law taxes transfers made by "sale" intended to take effect after the death of the "vendor"; but there can be no sale without a valuable consideration. Burdick, Sales (3rd ed.) § 1; Uniform Sales Act § 1 subd. 2. The clearness of the text is equally destructive of the argument from the maxim *noscitur a sociis* advanced in *Hagerty* v. *State,* and *Herold* v. *Blair, supra.* The contention that if the statute meant to tax transfers for valuable consideration, it would be unconstitutional, see *Blair* v. *Herold* (C. C. 1907) 150 Fed. 199, is untenable, since a tax on the sale or transfer of shares of stock is constitutional. *People ex rel. Hatch* v. *Reardon* (1906) 184 N. Y. 431, 77 N. E. 970, aff'd 204 U. S. 152, 27 Sup. Ct. 188; see *Matter of Keeney* (1909) 194 N. Y. 281, 87 N. E. 428. It is submitted that the law was intended to tax all transfers except such as part absolutely with the title, enjoyment, and possession in the transferor's lifetime. See *Lacy* v. *State Treasurer, supra; People* v. *Moir* (1904) 207 Ill. 180, 69 N. E. 905. The doctrine seems to be an example of judicial legislation, and in view of the further tendency of the court to refuse to investigate the adequacy of the consideration, see *Blair* v. *Herold, supra,* it opens the way to fraud and evasion. On its facts, however, the principal case is one of the most easily justifiable of those hard cases which have made bad law.

Telegraph Companies — Erroneous Transmission of Message — Agency.—The plaintiff's telegraphed offer of $20.00 per ton for cotton seed was negligently transmitted by the defendant as $22.00 per ton. The plaintiff paid the difference to the vendor, and seeks to recover that amount as damages from the defendant. *Held,* the defendant was not the agent of the plaintiff so as to bind him in contract, and hence the payment by the plaintiff was voluntary so that he cannot recover. *Mt. Gilead Cotton Oil Co.* v. *Western Union Telegraph Co.* (N. C. 1916) 89 S. E. 21.

The British Courts have repudiated the theory that a telegraph company is the agent of the sender so as to bind him in contract, *Henkel* v. *Pape* (1870) L. R. 6 Exch. 7; *Verdin* v. *Robertson* (Ct. of Sess. 1871) 10 Sess. (3rd series) 35, but the American authorities are divided. Joyce, Electric Law §907. Various jurisdictions follow the English doctrine in holding telegraph companies as independent principals, *Shingleur & Co.* v. *W. U. Tel. Co.* (1895) 72 Miss. 1030, 18 So. 425; *Pepper* v. *Tel. Co.* (1889) 87 Tenn. 554, 11 S. W. 783, while others adopt the theory of agency and bind the sender. *W. U. Tel. Co.* v. *Flint River Lumber Co.* (1902) 114 Ga. 576, 40 S. E. 815; *Sherrerd* v. *W. U. Tel. Co.* (1911) 146 Wis. 197, 131 N. W. 341. Public policy and commercial expediency are given by other courts as grounds for visiting any loss due to erroneous transmission upon the party electing the medium of communication. *Ayer* v. *W. U. Tel. Co.* (1887) 79 Me. 493, 10 Atl. 495; see *Younker* v. *W. U. Tel. Co.* (1910) 146 Iowa 499, 508, 125 N. W. 577. On principle, however, the instant case seems correctly decided, for it is difficult to see how agency, whether general or special, exists between the sender and the telegraph company. Agency is ordinarily not in the contemplation of either the sender or the company, and the latter is entirely out of the control of the sender and would seem to be an independent contractor, acting merely as a conduit for the message. See *Pepper* v. *Tel. Co., supra.*

Trade Marks — Infringement — Numerals as Trade Marks.—The complainant in an action in equity claimed that the defendant, by

putting on the market a cigar with the name "208" had infringed his exclusive right in the numerals "108" on his own brand of cigar. The number "108" seems to have been the street number of complainant's factory. *Held,* (Putnam, J. dissenting)—the complainant, not having taken proper exception, the court on appeal is not required to determine whether he has a valid trade mark. *Goldsmith Silver Co.* v. *Savage* (C. C. A. 1st Cir. 1916) 229 Fed. 623.

The dissenting opinion raises an interesting question upon which the cases are unsettled, whether a mere numeral or combination of numerals may constitute a trade mark. A trade mark is a symbol, mark, figure, letter, word, or any combination of these used primarily to indicate the origin or ownership of the article to which it is affixed. *McLean* v. *Fleming* (1877) 96 U. S. 245; Paul, Trade Marks §1 *et seq.* But if the mark used indicates quality or is in any way descriptive or generic, it will not be upheld as a trade mark. *Canal Co.* v. *Clark* (1871) 80 U. S. 311; *Amoskeag Mfg. Co.* v. *Spear* (N. Y. 1849) 2 Sandf. 599; *Columbia Mill Co.* v. *Alcorn* (1893) 150 U. S. 460, 14 Sup. Ct. 151; but *cf. Baglin* v. *Cusenier Co.* (1911) 221 U. S. 580, 31 Sup. Ct. 669. In most of the cases where a numeral or combination of numerals has been claimed as a trade mark the numeral was combined with some other symbol and the courts have applied the ordinary rules indicated above. *Humphrey's Medicine Co.* v. *Wenz* (C. C. 1882) 14 Fed. 250; *Gillott* v. *Esterbrook* (1872) 48 N. Y. 374; *Boardman* v. *Meriden Brittannia Co.* (1868) 35 Conn. 402; *Lawrence Mfg. Co.* v. *Lowell Hosiery Mills* (1880) 129 Mass. 325. While there is judicial expression to the effect that a naked numeral or combination of numerals cannot constitute a valid trade mark, see *Dennison Mfg. Co.* v. *Scharf etc. Co.* (6 C. C. A. 1905) 135 Fed. 625; Browne, Trade Marks (2nd ed.) §225 *et seq.*; Sebastian, Trade Marks (5th ed.) 93, the stronger authority, in accord with the dissenting opinion in the principal case, favors their validity. *American Button Co.* v. *Anthony* (1886) 15 R. I. 338, 5 Atl. 626; *Collins* v. *Reynolds Car Mfg. Co.* (N. Y. 1879) 7 Abb. N. C. 17; see *Boardman* v. *Meriden Britannia Co., supra; Shaw Stocking Co.* v. *Mack* (C. C. 1882) 12 Fed. 707; Paul, Trade Marks §54. The difficulty with this latter view is that numerals are ordinarily descriptive. But if it is shown that the numerals were arbitrarily selected to indicate origin and not quality, there seems to be no reason why they should not be protected as trade marks.

Trusts—Apportionment Between Life Tenant and Remainderman—Expenses and Cost of Improvements.—There was an equitable fee of the residue of an estate subject to an executory devise over on failure of issue. When the trustees asked for instructions as to the payment of assessments for permanent improvements, taxes on unimproved land, and certain annuities charged on the residue, as well as their own compensation for converting realty into personalty in accordance with the provisions of the will, the court *held* that all these expenses should be charged to the *corpus* of the estate, thereby working an equitable apportionment. *Sheffield* v. *Cooke* (R. I. 1916) 98 Atl. 161. See Notes, p. 597.

Workmen's Compensation Act—Death of Dependent—Effect on Payments Under the Act.—A Workmen's Compensation Act provides that the dependents of an employee, killed in the course of his employment, shall receive certain weekly payments "for a period of 300 weeks". *Held,* the right to this payment is not vested, but dies with the

dependent, and does not pass to her personal representative. *In re Murphy* (Mass. 1916) 113 N. E. 283.

Most Workmen's Compensation Acts are silent as to what legal effect the death of the dependent has upon the awards made under the act. Where the statute provides for the payment of a lump sum upon the death of an employee, and the dependent entitled thereto dies before the award is made, the courts hold that the money will pass to the personal representative. *Darlington* v. *Roscoe & Sons* [1907] 1 K. B. 219; *United Collieries* v. *Simpson* [1909] A. C. 383; Dawbarn, Employer's Liability and Workmen's Compensation (4th ed.) 396; Boyd, Workmen's Compensation §508. The only American jurisdiction where the question has previously arisen holds that, under a statute much similar to that in the principal case, the right to the installments passes to the representative. *Munding* v. *Industrial Comm.* (1915) 92 Oh. St. 434, 111 N. E. 299. The Illinois statute specifically provides that payments, with certain exceptions, shall cease upon the death of the dependent. Ill. Rev. Stat. (Hurd) c. 48, §146; *Matecny* v. *Vierling Steel Works* (1914) 187 Ill. App. 448. It would seem that the Ohio doctrine is the better. The claim of the dependent is not based on a right to damages for tort, but rather on a statutory compensation, see *supra,* p. 610, and thus, the doctrine *actio personalis moritur cum persona* does not apply. *Darlington* v. *Roscoe & Sons, supra; cf. Peebles* v. *Oswaldtwistle etc. Council* [1896] 2 Q. B. 159. It might be argued that the statute was intended to give compensation only to the dependents of the deceased and not to their legatees, but the very statute which the principal case interprets, Mass. Stat. 1911 c. 751, Pt. 2, §22 provides that in some cases a lump sum may be substituted, which of course, will vest and pass to the executors. It is difficult to distinguish, as regards vesting, the right to a lump sum from the right to the same amount in installments. Since the purpose of weekly payments is not to bestow a pension terminable upon death, but to prevent the squandering of the money, *Munding* v. *Industrial Comm., supra,* it would seem that the court erred in depriving the estate of that which the Legislature clearly intended to be the dependent's. An ideal statute would be one providing that a reaward among dependents could be made upon the death of the first recipient.

Workmen's Compensation Act—Evidence—Finding Based on Hearsay.—In a proceeding before the Workmen's Compensation Commission the finding of the Commission that the defendant was liable was based on hearsay evidence as to the nature and the cause of the decedent's injury, though the only direct testimony submitted was contrary to the hearsay evidence. Section 68 of the Workmen's Compensation Law provides that the Commission shall not be bound by "common law or statutory rules of evidence or by technical or formal rules of procedure". *Held,* two justices dissenting, although in the absence of direct testimony hearsay evidence might form the basis of an award, it is not sufficient when controverted by the testimony of eye witnesses. *Carroll* v. *Knickerbocker Ice Co.* (N. Y. Ct. of App. 1916) 113 N. E. 507, reversing the decision of the Appellate Division, (1915) 169 App. Div. 450, 155 N. Y. Supp. 1.

The decision in the Court of Appeals gives a salutory effect to Section 68 of the Workmen's Compensation Law. It refuses the extremely broad interpretation contended for, but still yields to the general purpose of the law. For a criticism of the decision in the lower court see 16 Columbia Law Rev. 81.

BOOK REVIEWS.

HARRY ROTKOWITZ, *Editor-in-Charge.*

THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE. By HOWARD LEE MCBAIN. New York: COLUMBIA UNIVERSITY PRESS. 1916. pp. xviii, 724.

In preparing this work Professor McBain has rendered a valuable service to students of municipal government and to the legal profession. The work opens with a discussion of the scope of legislative power over cities. Numerous instances are given of the practice formerly universally prevailing of interference by the legislatures of the states with the local affairs of cities, the result being that city governments were under the complete domination of the state politicians, and the people of the city had but little voice in the control of the affairs vitally concerning them. The irritation produced by this interference, which was considered unwarranted by the people of the cities, created a demand for a remedy.

In a few states the courts announced the doctrine of an inherent right of local self government. The author points out that this doctrine had but little basis in principle and, as it was actually applied, did not prevent the legislature from interfering with cities in a large variety of respects. The federal constitution afforded no refuge for the oppressed municipalities.

The author then discusses the constitutional limitations directed at specific legislative abuses. Some states amended their constitutions so as to provide for local election of certain city officers, and many states enacted provisions relating to the financial powers of cities and containing other prohibitions upon the powers of legislatures in specific instances, but these failed to give the cities the protection they desired.

More comprehensive protection being necessary, many state constitutions thereupon prohibited special legislation, which secured a small degree of immunity to the cities but were largely evaded by legislative classification of cities. In Ohio, for example, the Supreme Court until 1902 sustained a legislative classification whereby each city constituted a class by itself, and the legislature could, at will, regulate the "class".

In consequence of legislative meddling, a widespread agitation has resulted for what has come to be known as "home rule". As a result, the constitutions of twelve states have been amended to provide for various forms of home rule by permitting cities to frame their own charters. These states are Missouri, California, Washington, Minnesota, Colorado, Oklahoma, Arizona, Oregon, Michigan, Ohio, Nebraska and Texas, and the movement is still spreading. No two of these states have covered this subject in precisely the same fashion.

It is to these home rule constitutional provisions, the results obtained through them and the judicial decisions discussing them that Professor McBain's book is devoted. The matter of providing for home rule charters by constitutional provisions is a novel one, and the results of the constitution makers are, for the most part, crudely expressed; and, as the author points out, they frequently jar with other provisions in the constitution. In one case, the home rule provision is

not reconcilable even with other amendments adopted by the same constitutional convention.

The chief difficulty in framing a home rule charter consists in defining the measure of governmental authority which is to be given to a city, and in delimiting its powers from those of the state. A large question of public policy is presented in determining in what respects a city shall be subject to general state laws and where it shall be itself sovereign.

For the most part, home rule amendments cover the subject in very general terms; and necessarily there are numerous conflicts between acts of the legislature on the one hand and provisions of home rule charters or ordinances passed under them on the other. In view of the varied and numberless lines of state and municipal activity, no one could enumerate all the possible points of controversy. In some respects a prototype of this field of legal controversy is found in the judicial demarcation of the line between powers of the federal government and those of the state government.

The larger part of the work is taken up with a discussion of the scope of powers granted directly to cities by home rule amendments and the powers which cities may assume to themselves in framing their charters under such amendments. In California there are scores of judicial decisions with respect to such conflicts between state and municipal authority. The constitution there provides that city charters adopted by authority of the constitution shall be subject to general laws "except in municipal affairs". Just what is a "municipal affair" is a matter to be determined by the courts. The term cannot be adequately defined. Similar problems are presented to the courts of all the home rule states. The author has collected all the judicial decisions in which there were questions arising out of conflict between state laws and home rule provisions or ordinances passed thereunder. This was a laborious task and has been performed exceedingly well. Although this body of the law is still in its infancy, it is surprising how many judicial decisions have already appeared. In addition to discussing the problems that have already arisen, the author puts before himself, and suggests solutions of, hypothetical questions which will doubtless come before the courts in the future.

The author takes up each home rule state separately, quoting the constitutional provisions in full, giving a list of the cities that have adopted charters and then discussing the decisions relating thereto. The work concludes with a discussion of problems of public policy, such as: Shall the machinery for the initial exercise of home rule powers be prescribed by the constitution or by statute? Shall either the legislature or governor be given a veto power over charters or charter provisions? Shall the provisions of home rule charters be made subject to "general laws"? Shall home rule charters be made subject to laws of general concern?

In addition to pointing out what the results of home rule have been thus far, the book makes clear the point that the home rule amendments are needlessly indefinite and vague. By paying heed to the decisions upon the present constitutional amendment a state which adopts home rule amendments in the future should be able to do it so clearly as to prevent much of the controversy which arose over the construction of the now existing provisions.

As the book was not written by a practicing lawyer and was not intended solely for reference by practitioners, it is not a legal text of

the type which lawyers ordinarily consult. But the work will be exceedingly useful to lawyers having litigation in this field, and will be a great time saver in view of the complete collection of authorities on the subject. It is in fact the only work in its field. The work serves a dual purpose and the author discusses the policy of various provisions of the constitutions and statutes as freely as he analyzes the decisions.

Paul J. Bickel.

CRIMINALITY AND ECONOMIC CONDITIONS. By WILLIAM ADRIAN BONGER. Translated by Henry P. Horton. Boston: LITTLE, BROWN & Co. 1916. pp. xxi, 706.

This book makes a somewhat exhaustive study of criminality and the relation between criminality and economic conditions, and impresses the reader at the outset with its wealth of information and detail. While an American reader may not agree with many of the deductions made by Dr. Bonger, nevertheless the work should prove of value to students of sociology, of criminal conditions and the like.

The first half of the book is given over to a review of the works of those who have already written on the subject and contains some valuable criticisms of the various works that have gone before. The American reader doubtless will not agree with all the criticisms made by Dr. Bonger any more than he will feel able to agree with his deductions in the second half of the book. Nevertheless the review of these various authorities is very exhaustive, and the criticisms are evidently based upon a thorough study and wide experience.

Part II of the book treats of the present economic system, its consequences and its effect upon and relation to criminality. This part of the work is the more interesting. The first criticism that an American reader would make is that Dr. Bonger considers social conditions from the point of view of a socialist, and finds the source of all evil in the existence of wealth and capital and the relationship between capital and labor.

The attitude of the author is shown quite clearly in the following quotation:

"Human labor thus has become a commodity corresponding exactly to definition: First, it has no use-value for the possessor if he has not the means of production, and, on the other hand, has such a value for the person possessing these means: Second, the possessor of labor has the free disposition of it."

Another quotation:

"The so-called 'reserve army of labor' is a condition indispensable to capitalism—without it the power of organized labor would become so great, that the surplus value would run serious danger. It is just because the supply of labor exceeds the demand that the power of the capitalist over the workman is so great and also that it happens so often that the interests of the workman are thwarted."

In view of the recent intervention of our Congress in the differences between the railroads and their employees through the enactment of the Eight Hour Law, the following quotation is interesting:

"As regards the length of the working day; moderate work is a pleasure, excessive work mere torment. Except in so far as the laws

and the labor unions have intervened, the day has been prolonged until there is left only the time absolutely necessary for food and sleep."

As the President of the United States stated at the time that he signed the Eight Hour Law, the American people have come to believe that the ordinary day's work for any individual should be eight hours, and this conclusion of the American people is due neither to force nor to necessity.

One who is familiar with the conditions of the American laboring man, with his home life and surroundings, with his honesty and industry, is unwilling to agree with the author's conclusion that the laboring man's family is less moral than that of the wealthy man.

The classifications made by Dr. Bonger of the different social conditions is not applicable to conditions found in this country. The American laboring man of honesty and of industry has an opportunity to bring up a family with a fair amount of education. Our American system of public schools, the opportunities to acquire education at evening schools while employed during the day, and the encouragement and support given to one who is seeking an education, argues against the assumptions of Dr. Bonger.

The illustrious example that we have of a man born of parents possessing neither wealth nor education who became President of the United States, argues as to what may be accomplished.

We cannot read this book without being convinced that environment does indeed play a large part in the matter of criminality; but it is more difficult to agree that criminality is due in any large measure to our present economic system, or that community of the means of production would be a panacea for these evils.

The book is indeed interesting and valuable, if for no other reason than its mass of statistics and detail.

Arthur F. Driscoll.

THE LAW OF ARCHITECTURE AND BUILDING. By CLINTON H. BLAKE, Jr. New York: WILLIAM T. COMSTOCK CO. 1916. pp. xxxviii, 314.

This book by Clinton H. Blake, Jr., of the New York and Federal Bars, with a special introduction by Aymar Embury II, member of the American Institute of Architects, is a very readable statement of the elementary rules of building contracts, together with a brief discussion of the general principles governing the liens of the architect, contractor and sub-contractor. Both lawyers and architects will find it interesting and well worth while as general reading, from the introduction, with its layman's frank confession of ignorance of the law, to the appendix with its decisions for reference reading and its canons of ethics of the American Institute of Architecture.

No author could in the 180 odd pages (exclusive of introductions and appendices) discuss the entire subjects of builders' and architects' contracts and liens with sufficient detail to be of any practical help to the lawyer of a particular state. Eight pages to the lien of a contractor, eight pages to the lien of a sub-contractor, five and one-half pages to the requisites of a construction contract, and so on, cannot compass more than the elementary principles which any practicing attorney is presumed to know. The discussions of liquidated damage clauses, of clauses which do or do not oust the courts of their juris-

diction, of the subject of substantial performance, of a refusal of an architect's certificate, of the degree of care and skill required of an architect, etc., while clear in their phraseology and obviously correct, are not only statements of principles familiar to all first year law school students, but are also so brief as to be almost sketchy. For practical purposes from a lawyer's point of view, the book, particularly as regards liens, is no more than an admonition to look up carefully the statutes of his own state covering the subjects treated. Very appropriately, therefore, has the author given an excellent list of references, particularly to New York reporters, and so conveniently arranged as to furnish a lawyer a quick lead to important cases on special topics.

To the architect, the book will probably be of greater value than to the lawyer, especially in its emphasis upon the fiduciary relationship between architect and owner, and upon the strict limitation of the architect's authority with reference to departure from plans and specifications. A reading of the chapters dealing with his compensation and his duties and liabilities, would undoubtedly enable many an architect to avoid such mistakes as might jeopardize the collection of his fees. A reading of the entire book including the canons of ethics, would undoubtedly be of great benefit to the architect in fixing definitely in his mind his general relations to owner and contractor, and his obligations as a member of a respected profession to the public in general.

Gerald Donovan.

A Treatise on the Limitation of Actions at Law and in Equity. By H. G. Wood. Fourth Edition by DeWitt C. Moore. Albany: Matthew Bender & Co. 1916. pp. ccliii, xiii, 1765.

The fourth edition of Wood On Limitations presents to the profession a treatise representing the cumulative efforts of three able editors, H. G. Wood, John M. Gould and DeWitt C. Moore. Mr. Moore, who edits the present edition, aimed to supplement, at the same time to incorporate, rather than to alter, the third edition. Fifteen years have elapsed since the third edition. The great number of decisions rendered upon this branch of the law during this interval amply justifies the present work. The extent of this justification is reflected in the fact that the fourth edition contains five new chapters, 368 new sections and 6,787 new cases. Mr. Moore has retained the valuable illustrations of the author of the original work and also the notes to the third edition. The new matter he has arranged in new text and in independent supplementary notes. This arrangement is a fortunate one as the original notes were already copious and lengthy as to the points embodied. The new questions which are discussed in the added sections and notes, although greatly increasing the size and scope of the work, do not, because of the arrangement, seriously detract from the usefulness of the treatise. The ready use of the present volumes is further facilitated by the supplied parallel citation of the official and unofficial reports. Wood On Limitations has for a long time been regarded as a standard work and is frequently quoted, by attorneys and courts, on the law of limitations. The present revision by Mr. Moore is excellently done and deserves the standing and reliance accorded to previous editions.

Ira Lloyd Letts.

THE AMERICAN PLAN OF GOVERNMENT. By CHARLES W. BACON, assisted by FRANKLYN S. MORSE. New York: G. P. PUTNAM'S SONS. 1916. pp. xxi, 474.

In this volume the author groups the clauses of the Constitution under appropriate headings and seeks to show the meaning and effect of each clause by quoting extracts from the opinions of the Supreme Court. These extracts are usually apposite, but often the cases from which they are taken are not based on the precise clause which the author is considering. The book is a collection of essays contained in judicial opinions rather than a discussion of legal decisions. The arrangement makes it impossibe for a reader to discover from it the law on any constitutional question. The method which the author has adopted indicates that the book is not designed to be of service to lawyers. It is constructed on the model of the dictionary in which the words and phrases of the Constitution are given the definitions which they have received in judicial opinions. The material thus brought together indicates clearly that our actual working constitution of today is in large measure the product of judicial interpretation. The written instrument framed by the Fathers was but the first step. Though Mr. Bacon has shown the significance of the part which the judiciary play in our constitutional system, his book hardly merits the claim made for it by Mr. George Gordon Battle in the Introduction, that it "gives the reader the real meaning of the Constitution". The real meaning of the Constitution cannot be discovered from definitions given to its phrases, even though such definitions appear in official opinions. Its meaning must be found from the specific things which the Constitution has been held to prohibit or permit. The short-cut of general statement is an unsafe substitute for the longer way of painstaking collection, analysis and synthesis of actual decisions. If Mr. Justice Holmes is right that "general propositions do not decide concrete cases", any collection of such general propositions or definitions must fall far short of giving us "the real meaning of the Constitution".

MAGNA CARTA AND OTHER ADDRESSES. By WILLIAM D. GUTHRIE. New York: COLUMBIA UNIVERSITY PRESS. 1916. pp. vi, 282.

In this volume the author has put into permanent form ten addresses made by him on various occasions between the years 1906 and 1915. For the most part they are concerned with problems of constitutional law and of government, and were delivered before such assemblages as the New York State Constitutional Convention, the New York State Bar Association, the Pennsylvania Bar Association. The addresses include among others "Magna Carta", "The Mayflower Compact", "Constitutional Morality", "The Eleventh Amendment", "Criticisms of the Courts", "Nominating Conventions". The "Magna Carta" address was delivered before the Constitutional Convention of the State of New York at its celebration of the 700th anniversary of Magna Carta. Many of the cardinal principles of our system of constitutional law are to be traced back to the Great Charter of 1215; and one readily agrees with the author that there are no Americans to-day "but are big with the privileges of Magna Carta". Throughout these addresses there appears the distrust of the new in our political development, the initiative and referendum, the recall of judges and of judicial decisions, the direct primary. Indeed the attitude of the

author is clearly indicated at the end of the first paragraph of his Magna Carta address where he says, "This ceremony must again emphasize the truth that everything which has power to win the obedience and respect of men must have its roots deep in the past, and that the more slowly institutions have grown so much the more enduring are they likely to prove." In several of the addresses there is an authoritative and convincing defence of the courts against the unjust and ignorant criticism to which they have been subjected during recent years. The author presents his views in a manner which holds the reader's attention throughout, and the volume will be found to be valuable by all who are interested in the many-sided problems of modern government and of constitutional law.

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POWERS AND THE RULE AGAINST PERPETUITIES.

EFFECT OF LEGISLATION AUTHORIZING SALE OF TRUST PROPERTY.

The question of the application of the rule to these powers has lost a great deal of its practical importance in consequence of the legislation adopted in modern times in many jurisdictions empowering the courts to authorize sales, &c.,[41] of trust property in cases where there is no power or the power conferred is for any reason ineffectual. If in any jurisdiction where such legislation is in force a doubt should arise as to the validity of the title passing under the power, the parties would probably be able to resort to the jurisdiction of the court and thus avoid any question.

POWER TO LEASE.

The case of a power in a trustee to lease the trust property is subject to a different principle. The lease creates no freehold estate and has no effect on the vesting of the future interest in the fee. The question of how far the lessee may assert his title against a future interest vesting after the making of the lease is entirely apart from the Rule against Perpetuities. It is probable that the only effect of the power is to make the lease binding as against all parties in interest.[42] The circumstances that the prop-

[41]Challis, Real Property (3rd ed.) 194. In England, Settled Land Act of 1882, see, Peters *v.* Lewes & E. G. Ry. (1881) 18 Ch. D. 429, reversing 16 Ch. D. 703. In Pennsylvania, Act of April 18, 1853, Pamph. Laws p. 503; *cf.* Hutchison's Appeal (1876) 82 Pa. 509, where the court said that the statutory control over the exercise of the power vested in the court would prevent its exercise contrary to the Rule against Perpetuities.

[42]In Barnum *v.* Barnum (1866) 26 Md. 119 the clause conferring power to lease expressly provided that any lease made was to continue for its stipulated time, notwithstanding the prior termination of the trust.

erty is subject to a lease is immaterial if the future interest vests in time.[43]

There is so great a dearth of authority on the point that there is room to suspect that the general opinion in practice is that the Rule against Perpetuities is not involved; in other words, that the limitation made by the exercise of the power by way of a lease is not a limitation subject to the rule. The notion appears in some of the cases that a long term lease is obnoxious to the rule. This is a misapprehension. The interest of the lessee vests immediately upon the making of the lease, and even if the rule is applicable the circumstance of its long duration is immaterial. Such a lease is, if anything, a restraint on the enjoyment of the fee. It is never a restraint on alienation. The few cases which have been found are collected in the note.[44]

The question as to application of the Rule against Perpetuities to limitations under a power of sale in a trustee is not involved in the case where there is a restriction on the exercise of the power preventing the sale of the property. Such a restriction is a restraint on alienation. The circumstance that the restriction ex-

[43]Lewis, Perpetuities 547, notes that powers of leasing stand on a different footing because they do not operate to change title or the interest of the party beneficially interested to some other property. Mr. Gray, Rule against Perpetuities (3rd ed.) § 487, see note 3 on p. 406, says, that a power to lease is not an exception to the Rule against Perpetuities. 2 Sugden (8th ed.) 327 *et seq.*, in discussing powers to lease does not notice any objections to them on the ground of perpetuity.

[44]In Barnum *v.* Barnum (1866) 26 Md. 119, the *cestui que trust* was entitled to terminate the trust because the limitations violated the Rule against Perpetuities and the power to lease fell with the trust.

In Pennsylvania Horticultural Society *v.* Craig (1913) 240 Pa. 137, 87 Atl. 678, there was an application by *cestui que trust* to terminate the trust. The trust was held valid and a lease of thirty years made by the trustee not in violation of a restraint of alienation imposed on the trustee by the terms of the trust.

A lease for 999 years by a tenant for life is not objectionable, 2 Sugden, Powers (8th ed.) 363, 364. In Collins *v.* Foley (1884) 63 Md. 158, there was a gift by will to trustees for *A* for life then for the children of *A* and their descendants who should be living at *A's* death, the trustees to have full power to lease with consent of life tenant and at his death with consent of court. *A* died leaving four children one of whom reached 21 in 1875; in 1876 the trustees leased a part of the trust property for 99 years. It was held the power was valid but it was not clear how the case arose, the discussion being chiefly directed to whether the power was a limitation on alienation. In Hutchison's Appeal (1876) 82 Pa. 509, where it was held that partition would not lie because there was an active trust, the court in a *per curiam* opinion said by way of dictum, the trustee being vested by the trust, with power to rent or sell at his option that the trustee would be subject to the control of the court by statute if he undertook to make leases contrary to the policy of the law which forbids perpetuities.

tends into a remote period measured by the statement of the Rule against Perpetuities does not make the case one of an application of the rule. Thus, in the case of *In re Raphael,*[45] a testator by will conferred on trustees power of sale (general) exercisable after the death of a tenant for life. By codicil he directed that no portion of his real estate should be sold until thirty years after his death. It was held upon a summons to construe the will that the 30 years limitation was void but that it was separable from the general power of sale which remained valid after the death of the tenant for life.

So also a covenant not to sell except upon certain conditions contained in a voluntary declaration of trust is not a power but a restraint on alienation.[46]

POWER OF A TRUSTEE AS TO THE EQUITABLE TITLE.

An equitable power is a power to affect the equitable estate of the *cestui que trust,* such as powers in a trustee to make advances out of principal, fix the proportions in which one or more of the *cestuis que trustent* shall share the fund, pay over such part or parts of the income as they may think fit to the *cestuis que trustent,* etc. Such powers exist only between the trustee and the *cestui que trust,* and have nothing to do with the legal title and may be exercised so as to create a remote equitable limitation.[47]

A question as to the validity of the limitations under the power may arise on an application by the *cestui que trust* to have the terms of the trust carried out.[48] Where the *cestui que trust* is asking for the legal title, and the trust is invalid as a restraint on his ownership, no question as to any limitations under the power

[45](1903) 3 N. S. Wales St. Rep. 196.

[46]See Winsor *v.* Mills (1892) 157 Mass. 362, 32 N. E. 352. The circumstance that the land was not to be sold except with the consent of *A* did not give *A* a power. He could not produce any change in the title to the land. See Gray, Rule against Perpetuities (3rd ed.), § 509-M.

[47]An example will illustrate the distinction: suppose a gift to *A* in trust for *B* and *C* for life, and after the death of the survivor, to *X* and his heirs, with power in the trustee to apportion the income between *B* and *C* in such proportions as he shall think fit. This is the power to affect the equitable estate. Suppose a gift to *A* in trust for *B* for life, and after his death to his children then living, for their lives, and after the death of the survivor, to the *Y* charity, with power in the trustee to sell the trust property at such times and at such prices as he may think best. This is a power to affect the legal title.

[48]*E. g.*—Duke of Marlborough *v.* Godolphin (1759), 1 Eden 404.

seems to be before the court because in such case the power falls with the trust and can never be exercised.[49]

The equitable interests created by the trustee in exercising the power are created by the donor of the trust because they are made by the trustee under the special power without which he would be unable to create them.[50] Consequently, the period prescribed by the rule runs from the time of the creation of the trust, and the limitations made by the trustee under the power are judged as to their remoteness accordingly. This seems clear on authority, although the case has never been separately discussed by the text writers.[51] The few cases which have been found are collected in the note.[52]

It seems that if the power must necessarily be exercised in time, the limitation will be valid notwithstanding invalid limitations might have been created by the exercise of the same power.

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[49]Mainwaring *v.* Baxter (1800) 5 Ves. 457. In this case there was a settlement by deed with power in the trustees to raise five thousand pounds at any time during the continuance of the trust, which was remote. On application of the *cestui que trust,* the conveyance of the legal title was decreed.

[50]The same principle applies here as in the case of special powers of appointment.

[51]This principle is well put by Lord Keeper Nottingham in Duke of Marlborough *v.* Godolphin (1759) 1 Eden 404, at p. 417, where he said, "One would think it strange that it should be admitted, (particularly in a court of equity, the jurisdiction of reason) that the Duke of Marlborough could not limit his estate to Duke George for life, with remainder to his sons in tail male, because it is locking up the estate beyond the duration allowed by law, but that he may deliver the keys to another, and impower him to do that, which he himself could not."

[52]Duke of Marlborough *v.* Godolphin (1759) 1 Eden 404, trust for an estate tail, with power in the trustees, upon the birth of every son of each tenant, for life, to revoke the trust and limit the property to such sons for their lives, with remainder to their sons in tail male. The court refused to decree the execution of the power. Ferrand *v.* Wilson (1845) 4 Hare 344. Power in trustees to cut timber for the purpose of settlement, was held a power to receive and invest the annual profits of the estate until a tenant in tail should attain twenty-one, an event which might not occur until a remote period. It was held that the tenant in tail expectant of the present life tenant was not entitled to any accounting of timber cut during the life of the preceding tenant nor to an account of the timber felled during the period to which the power might have been lawfully extended as such powers had not been apportioned. See Marsden, Perpetuities 244, 245, for comments on this case. *In re* De Sommery [1912] 2 Ch. 622. Power to pay capital or income to nephew, wife, child or children held separable and valid as to nephew and void as to nephew, wife, child or children. Question arose on summons to determine whether trust for nephew, wife, children was void for remoteness. See also Attenborough *v.* Attenborough (1855) 1 Kay & J. 296; Bartlett *v.* Sears (1908) 81 Conn. 34, 70 Atl. 33; Floyer *v.* Bankes (1869) L. R. 8 Eq. 115; *cf.* Quinlan *v.* Wickman (1908) 233 Ill. 39, 84 N. E. 38; Wagner *v.* Wagner (1909) 149 Ill. App. 73.

No case, however, of an equitable power in a trustee has been found in which this principle has been involved.

A power in a trustee as to the equitable title may be exercisable at all times during the continuance of the trust, and may therefore be exercisable within and without the period prescribed by the rule.[53]

The opinion has been expressed that a limitation by the trustee in such a case made by the exercise of the power within the period would be void.[54]

While no decision in point has been found it seems that on the general analogy arising from the application of the rule in other cases that the opinion is correct. There is however some authority to the contrary.[55]

A case may therefore arise where the trust will be valid for a longer period than that during which the equitable power in the trustee may be exercised so as to create a valid limitation.[56]

In the case, however, of a direction to a trustee to accumulate income the accumulations under the exercise of the power will be sustained *pro tanto.*

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[53]Thus, suppose a gift to *X* in trust for *A* an unmarried person, for life, then to his oldest son for life, then to *X* a living person, and his heirs, with power in the trustee to make advances out of principal to the various life tenants in such sums and at such times as he may in his discretion, think proper. An advance to the son forty years after the father's death, if the son lived that long, would be remote and invalid, and in such case the trustee would be answerable to *X* for the unlawful disposition of the principal.

[54]Gray, Rule against Perpetuities (3rd ed.) § 246. Where there are no statutes authorizing a substituted trustee to exercise a personal discreation, it may be argued that such powers are not remote, as they must necessarily be exercised during the life or lives of the trustee or trustees appointed under the will; see remarks of the court, Allison, P. J., in Pennsylvania Co. *v.* Price (Pa. 1870) 7 Phila. 465 at 469. If the power is limited to be exercised only during the life of *A* an advance under it during that time would be valid. Mr. Gray's remarks are confined to discretion. There is no distinction between a discretion and a power in this respect.

[55]In Bartlett *v.* Sears (1908) 81 Conn. 34, 70 Atl. 33 the trustee had power any time after children came of age to enlarge their estates to a fee and it was held without much discussion that the power was valid if exercised at the majority of the children, that is, that the trustee could at that time create limitations which would be valid within the rule although there was apparently a power exercisable at a remote period.

[56]Thus, suppose a gift in trust for a daughter for life, and after her death to her children for life, and after the death of the children to the *X* charity, with power in the trustee to advance $5,000 out of the principal to any *cestui que trust* during the continuance of the trust. The exercise of the power subsequent to twenty-one years after the death of the daughter will create an invalid limitation and yet the trust may remain for many years after that period.

A direction or authority in a trustee to accumulate income should be referred to in passing as it is a case of a power in a trustee as to the equitable title. Two cases may arise. 1. Where the direction or authority is with respect to an income vested in a *cestui que trust* under the terms of the trust and there is no gift of the accumulations to any one else. In this case the direction to accumulate is a restraint on the enjoyment of the income by the *cestui que trust* and void if it is void at all as a restraint on enjoyment. 2. Where there is a direction to accumulate income and a direction to pay over the accumulations in a specific way. Here there is a gift of a fund based on accumulated income and the party to whom the fund is given takes an interest therein arising at a future time, which is subject to the application of the Rule against Perpetuities.

POWERS IN TRUST.

A power in trust is a direction to dispose of the property in the manner specified, and the interests taking effect under the power are directly created by the donor. The period prescribed by the rule begins to run, therefore, from the date of the creation of the power. This is so clear that it has never been questioned, and this part of the subject presents little difficulty. The ordinary case of such a power is a power of sale. If the limitations are such that the interests of the donees in the proceeds take effect at a remote period, they are void; consequently the power out of which they are to arise has no other reason for existence and becomes useless. A court of equity will not permit the person who is to exercise it to proceed in the matter, because to do so would assist him in the creation of a perpetuity. Nor on the other hand will it compel the exercise of the power on behalf of any one claiming to take under the void limitations.[57]

It is not the power that is remote, but the interest limited to take effect upon the exercise of the power. Where the person or persons entitled to the proceeds take an immediate vested interest therein or an interest which vests or must vest within the period prescribed by the rule, the limitations are obviously valid, and the person or persons entitled, or all of them if more than one, can permit the property to remain unsold for such period as they may see fit. If they do so the circumstances presented do not call for the application of the Rule against Perpetuities. They can,

[57]Merlin *v.* Blagrave (1858) 25 Beav. 125.

however, at any time, with the assistance of a court of equity, compel a sale. It will be observed that the power of the parties entitled to compel an exercise is the result of the validity of the limitations, and not the validity of the limitations the result of the power to compel.[58]

While the conventional phrase has been adopted the better expression as pointed out by Mr. Gray would be that there is a trust in the form of a power.[59]

The case which generally arises is where there is a power of sale limited to be exercised at a remote period with the interest in the proceeds vesting at the time of sale. In these cases the exercise of the power is necessarily a condition precedent to the vesting and the limitations are consequently void under the rule making the period run from the time of the creation of the power.[60]

POWERS OF APPOINTMENT.

A power of appointment may be restricted as to the objects in favor of which it may be exercised, as a power to appoint to children, which is called a special power of appointment, or as to the manner of its exercise, as a power to appoint by deed or will. A power unrestricted as to its objects is called a general power. Such a power may be exercisable by will only or by deed or will, and each case is sometimes referred to as a general power. It is often important to distinguish between the two cases and we shall accordingly indicate which one is referred to.

Powers of appointment will therefore be discussed under the headings of (1) special powers (2) general powers.

The Rule against Perpetuities applies to all limitations made by the exercise of a power of appointment and the sole difficulty is as to the time from which the period prescribed by the rule begins to run.

It is clear, under all the authorities, that where the power is

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[58]Mr. Gray does not bring this point out. His remarks, Rule against Perpetuities (3rd ed.) §§ 486-509-J, are not clear.

[59]25 Harvard Law Rev. 2.

[60]Hale *v.* Pew (1858) 23 Beav. 335; Merlin *v.* Blagrave (1858) 25 Beav. 125; Floyer *v.* Bankes (1869) L. R. 8 Eq. 115; *In re* Wood [1894] 2 Ch. 310; Goodier *v.* Johnson (1881) 18 Ch. D. 441; *In re* Bewick [1911] 1 Ch. 116; Dawson *v.* Lancaster (1903) 28 Pa. C. C. 657. Under the provisions of the N. Y. Revised Statutes the period runs from the time of the creation of the power. Matter of Will of Butterfield (1892) 133 N. Y. 473, 31 N. E. 515; Buchanan *v.* Tebbetts (1893) 69 Hun 81, 23 N. Y. Supp. 244; Murray *v.* Murray (1887) 7 N. Y. St. Rep. 391; *cf.* Estate of Heberle (1909) 155 Cal. 723, 102 Pac. 935.

restricted as to objects, the period prescribed by the rule runs from the time of the creation of the power.[61] The reason is not so clear.

Mr. Lewis says:[62] it is because "the maxim *quod facit per alium facit se* necessarily implies that that, which is not allowable for an individual to do himself, must be equally improper when effected in the person of another," consequently, a limitation too remote is equally objectionable when made by another to whom has been entrusted a power of appointment not commensurate with the entire ownership of the property. This reason does not go far enough. It does not explain why the maxim *quod facit* applies. It is submitted that this maxim applies because the tenant of the particular estate is enabled to do something not incident to his estate, and his capacity to so act depends on the power, not on his title, consequently, he is doing something on the authority of another person, and not in his own right. The act, therefore, of the

[61]In the following cases where there was a special power of appointment the remoteness of the appointments made by the donee was determined by making the period prescribed by the rule run from the time of the creation. Routledge *v.* Dorrill (1794) 2 Ves. Jr. 356; Kampf *v.* Jones (1837) 2 Keen 756; Phipson *v.* Turner (1838) 9 Sim. 227; Griffith *v.* Pownall (1843) 13 Sim. 393; Peard *v.* Kekewich (1852) 15 Beav. 166; Morse *v.* Martin (1865) 34 Beav. 500; see Gray, Rule against Perpetuities (3rd ed.) 426, n. 1. Wilkinson *v.* Duncan (1861) 30 Beav. 111 s. c. 7 Jur. N. S. 1182; D'Abbadie *v.* Bizoin (1870) 5 Ir. Eq. 205; Webb *v.* Sadler (1872) L. R. 14 Eq. 533; Slark *v.* Dakyns (1874) L. R. 10 Ch. App. 35; *In re* Brown and Sibly's Contract (1876) 3 Ch. D. 156; Blight *v.* Hartnoll (1881) 19 Ch. D. 294; see Marsden, Perpetuities (1883) 239 and Gray, Rule against Perpetuities (3rd ed.) 399 n. 1 for comments on this case. Von Brockdorff *v.* Malcolm (1885) 30 Ch. D. 172; *In re* Coulman (1885) 30 Ch. D. 186; Cooke *v.* Cooke (1887) 38 Ch. D. 202; Tredennick *v.* Tredennick [1900] 1 Ir. 354; *In re* Hallinan's Trusts [1904] 1 Ir. 452; *In re* Bowles [1905] 1 Ch. 371; *In re* Thompson [1906] 2 Ch. 199; White *v.* Commissioner for Stamps (1908) 8 N. S. Wales St. Rep. 287; *In re* Norton [1911] 2 Ch. 27; *In re* Chrichton's Settlements (1912) 56 Sol. L. J. 398; Bartlett *v.* Sears (1908) 81 Conn. 34, 70 Atl. 33; Stone *v.* Forbes (1905) 189 Mass. 163, 75 N. E. 141; Albert *v.* Albert (1887) 68 Md. 352, 12 Atl. 11; Thomas and Pennington *v.* Gregg (1892) 76 Md. 169, 24 Atl. 418; Graham *v.* Whitridge (1904) 99 Md. 248, 57 Atl. 609; Reed *v.* McIlvain (1910) 113 Md. 140, 77 Atl. 329; Hillen *v.* Iselin (1895) 144 N. Y. 365, 39 N. E. 368, s. c. 67 Hun 444; *Re* Phillips (1913) 28 Ont. L. Rep. 94; Heald *v.* Briggs (1910) 83 Conn. 52, 74 Atl. 1123, provisions of Connecticut Statutes involved. Smith's Appeal (1879) 88 Pa. 492; Gardette's Estate (Pa. 1883) 1 Phila. 264; Brown *v.* Trust Co. (1906) 123 Ky. 775, 97 S. W. 421. Under the New York Revised Statutes the period runs from the time of the creation of the power in all cases of powers of appointment. Genet *v.* Hunt (1889) 113 N. Y. 158, 21 N. E. 91; Dana *v.* Murray (1890) 122 N. Y. 604, 26 N. E. 21; *In re* Bankers Trust Co. (1913) 143 N. Y. Supp. 843, 92 Misc. Rep. 375. See as to New York Law, article by Stewart Chaplin, "Period of Suspension under an Instrument in Exercise of a Power." 10 Columbia Law Rev. 495.

[62]Perpetuities, 322.

donee of the power is considered very properly as the act of the donor of the power. The case is really that of a gift to a person unascertained, and that ascertainment is left in the discretion of the donee of the power.[63]

That this is so appears from the wording of all powers, *e. g.*,— to *A* for life, and after his death to such persons as he shall by will appoint. The limitation here is directly to the persons to be appointed by *A*, and they become certain immediately upon his death, having exercised the power. The case therefore, comes squarely within the wording of the rule, because the future interest is limited at the time of the creation of the interest to such persons as shall be ascertained, the limitations under which ascertainment must vest within life or lives, &c., from the time of the creation of the power under which they are to be ascertained.[64]

Where the appointee joins in a settlement executed in pursuance of the power the case is regarded as if the appointment had been made to him in fee and he had then made the limitations contained in the settlement. In such a case the period prescribed by the rule runs from the date of the execution of the power.[65]

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[63]This is well stated in the case of Robinson *v.* Hardcastle (1787) 2 Term Rep. 241.

[64]Mr. Gray, Rule against Perpetuities (2nd ed.) § 514, gives as a reason that were this not so, each tenant for life might appoint for life, and an indefinite series of life estates created, and thus the very evil at which the rule is aimed, would exist. It is submitted, however, (1) that this is simply saying that the exercise of the power does create a remote estate, whereas, the question is, is the limitation too remote? (2) That it gives a reason calling for the rule forbidding restraints on alienation and not the Rule against Perpetuities and does not, therefore, solve the problem. The learned author made no change in this statement in the 3rd edition although it may be inferred from his language in 26 Harvard Law Rev. 720, that he was inclined to the view set forth in the text.

[65]In a number of such cases where there was a special power of appointment the question was whether the settlement could properly include objects outside the special power and it was held that it could on the principle stated in the text, and although the limitations of the settlement were remote dating from the creation of the power no question of remoteness was raised or discussed. Langston *v.* Blackmore (1755) Amb. 288; Gosset's Settlement (1854) 19 Beav. 529; Wright *v.* Goff (1858) 22 Beav. 207; Fitzroy *v.* The Duke of Richmond (1859) 27 Beav. 190; Irwin *v* Irwin (1859) 10 Ir. Ch. 29; Daniel *v.* Arkwright (1864) 2 Har. & M. 95; Cooke *v.* Cooke (1887) 38 Ch. D. 202. In Wombwell *v.* Hanrott (1851) 14 Beav. 143, the limitations were not remote, and in White *v.* St. Barbe (1813) 1 V. & B. 399, the discussion was as to what amounted to such concurrence on the part of the appointees of the will. In Birley *v.* Birley (1858) 25 Beav. 299, the question was whether the settlement was a breach of the power. In Salmon *v.* Gibbs (1849) 3 De. G. & Sm. 343, the appointment was invalid because made in pursuance of an unlawful agreement with one of the appointees. So also in Pryor *v.* Pryor (1864) 2 De G. J. & S. 204, the appointment was held void in equity because made upon a bargain for the benefit of persons not objects of the power.

Where a donee of a power restricted as to objects delegates the power the delegation will be subject to the same restrictions and consequently the period prescribed by the Rule against Perpetuities will still run from the time of the creation of the power in judging the validity of the limitations created by the exercise of the second power. No case on this point has beeen found however.

Where, however, such a donee appoints an absolute estate to an object of a power the restriction imposed in the creation of the power both as to objects and as to the running of the period prescribed by the Rule against Perpetuities ceases and the case stands so far as such an owner is concerned as if there never was such a power.[66]

The law, furthermore, is that the appointment of a life estate to the object with general power to appoint by deed or will is the appointment of an absolute ownership because the appointee can give himself the fee. Therefore both as to the restriction as to objects imposed by the donor of the first power, as well as to the running of the period prescribed by the Rule against Perpetuities the appointee stands as an owner of an absolute estate.[67]

The same rule applies where there is a life estate with general power to appoint by will only. In such case the appointee can exercise a power by will in favor of objects other than those specified in the creation of the original power. The donee is regarded so far as objects are concerned as if he were an absolute owner although he is not such an owner either in fact or by way of fiction.[68]

This principle has been applied also in considering the application of the Rule against Perpetuities to the limitations created

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[66]Carr *v.* Atkinson (1872) L. R. 14 Eq. 397; Romilly, M. R. at 401 said, "This is an attempt to create a new power, which cannot be created, in a person who was merely an object of the power."

[67]Farwell, Powers (2nd ed.) 292, citing Bray *v.* Bree (1834) 2 Cl. & F. 453 and Jebb *v.* Tugwell (1855) 7 De G. M. & G. 663.

[68]Morse *v.* Martin (1865) 34 Beav. 500. A father under a power to appoint to his children appointed a share to a daughter for life for her separate use with remainder as she should by will appoint. Held a good execution of the power of the father. Romilly, M. R. said at 503 "I think it quite settled that in dealing with powers, when you give the appointee the absolute power of disposing of the property you make an appointment in favor of that person." This means not as to remoteness but that a power to appoint to *A* is well executed by giving *A* a life estate with power to appoint. (Not that a life estate with power to appoint gives practically a fee.) Gray, Rule against Perpetuities (3rd ed.) § 526a.

by the exercise of such a power by will. This will be referred to further under the discussion of general powers to appoint by will.

GENERAL POWERS OF APPOINTMENT.

General powers of appointment, that is, powers unrestricted as to the objects, have given rise to some difficulty. Two cases may arise: (1) general power to appoint by deed or will, (2) general power to appoint by will only. We will discuss these in the order named.

GENERAL POWER TO APPOINT BY DEED OR WILL.

Where there is a general power to appoint by deed or will, the donee may appoint by deed and give himself the fee. He will be regarded as having done that which he might have done, and, by way of fiction, as being the owner in fee at the time of the execution of the power, and the period prescribed by the rule will begin to run from that time.[69]

Mr. Gray says:[70] that it is because the donee is practically the owner since he can appoint to himself in fee in his lifetime. While this describes the situation, it does not altogether bring out the reason why he is practically the owner of the fee.

Where, however, the donee appoints by deed an estate less than a fee, the validity of the limitations will be judged by the remoteness from the time of the creation of the power[71] because the appointment by deed of less than an absolute ownership precludes the possibility of entertaining the fiction that the donee has made himself the owner of the fee.[72]

Where, however, such a power has been conferred to be exercised at a remote period, some doubt has been raised[73] as to whether the same exception applies on the ground that since the donee may not exercise the power to give himself the fee until

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[69]Lewis, Perpetuities 483-484; Gray, Rule against Perpetuities (3rd ed.) § 524, n. 3 on 432, and authorities cited. Mifflin's Appeal (1888) 121 Pa. 205, 15 Atl. 525. Dictum Sergeant J. in Thompson *v.* Garwood (Pa. 1838) 3 Wharton 287 at 306, 31 Am. Dec. 502.

[70]Rule against Perpetuities (3rd ed.) § 524.

[71]Eno *v.* Eno (1847) 6 Hare 171.

[72]Where, however, the power exercisable by deed or will is restricted as to its objects, the case is that of a special power and the period prescribed by the rule accordingly runs from the time of the creation of the power. Gray, Rule against Perpetuities (3rd ed.) § 525.

[73]Remoteness of General Powers, J. L. Thorndike, 28 Harvard Law Rev. 664.

a remote period, there is a possibility that the limitations created by the exercise of the power may be subject to a remote condition precedent.[74]

If the period prescribed by the rule begins to run from the time of the exercise of the power, then that exercise cannot be remote from any period of time. It will not do to say that the period runs from the time of the exercise of the power in determining the validity of the limitations, when the power happens to be exercisable only at a period which is not remote from the creation of the power, and then say that the period runs from the time of the creation of the power when the power is exercisable at a period remote from its creation. And even if this inconsistent view be adopted, since the donee is regarded as the owner in fee at the time of exercising the power, on the fiction that he has done that which he might have done, it seems just as possible, in the case put, where he has had the opportunity to give himself the fee within the period prescribed, to entertain the fiction that the donee shall be regarded as having given himself the fee within the period prescribed by the rule. Furthermore, the power to will being dependent on and destructible by the power to appoint by deed, is a power existing by the sufferance of the owner of the fee, and therefore it is immaterial if it may be exercised at a period remote from the time of the creation.

No other cases have been found except those cited in the note, and under them the law probably is, at least in England, that no valid limitations can be created by the exercise of the power.

GENERAL POWER TO APPOINT BY WILL.

When we consider the other case of a general power to appoint by will only, we come upon a considerable conflict of opinion as to whether the period prescribed by the rule runs from the time of the creation of the power or from the time of its exercise. It has been contended that a power to appoint only by will stands,

[74] In Bray *v.* Bree (1834) 2 Cl. & F. 453, the limitations created by the exercise of such a power were held valid. In Morgan *v.* Gronow (1873) L. R. 16 Eq. 1, the limitations were held void, although in point of fact vesting in time, under the influence, however, of the erroneous notion that an appointment to a person unborn at the date of the creation of the power violates the rule. In *In re* Hargreaves (1889) 43 Ch. D. 401, it was held that the power could never be exercised so as to create a valid limitation. Mr. Gray, Rule against Perpetuities (3rd ed.) § 477, is of the opinion that such a power is "not obnoxious to the Rule against Perpetuities."

from its nature, in the same category as a special power of appointment, that the donee acts under the authority of the donor entirely outside the scope of his interest in the land. This view is supported by a number of text writers,[75] and by the overwhelming weight of authority. These cases do not require any special notice as they proceed on the same principle as powers restricted as to objects.[76]

There are, however, several English cases in support of the proposition that the donee of the power to appoint by will is in the

[75]Gray, Rule against Perpetuities (3rd ed.) § 526 *et seq.* Mr. Gray is of the opinion that the period runs from the time of the creation of the power. Marsden, Perpetuities p. 250, citing *In re* Powell (1869) 39 L. J. Ch. 188. At p. 250, Mr. Marsden says, "The donee of a general power of appointment has, as regards the operation of the Rule against Perpetuities, the same capacity of disposition as an absolute owner", citing 1 Sugden, Powers (8th ed.) 395-396. Mr. Marsden does not say whether he means by a general power a power to appoint by deed or will. It may be assumed that he does since in the next paragraph he speaks of a general power to appoint by will.

[76]In these cases of a power to appoint by will only, unrestricted as to objects, the validity of the limitations made by the exercise of the power were judged by their remoteness from the time of the creation of the power. Bristow *v.* Boothby (1826) 2 Sim. & S. 465, s. c., 4 L. J. [O S.] Ch. 88. See Gray, Rule against Perpetuities (3rd ed.) § 476a, for a discussion of this case. *In re* Powell's Trusts (1869) 39 L. J. Ch. 188, see excellent statement of James, V. C. at 189, 190. Wollaston *v.* King (1869) L. R. 8 Eq. 165; Morgan *v.* Gronow (1873) L. R. 16 Eq. 1; *In re* Hargreaves (1889) 43 Ch. D. 401; *In re* Phillips (1913) 28 Ont. L. R. 94; Smith's Appeal (1879) 88 Pa. 492, discussed Gray, Rule against Perpetuities (3rd ed.) § 523; Foulke, Rule against Perpetuities in Pennsylvania § 395; Lawrence's Estate (1890) 136 Pa. 354, 20 Atl. 521 discussed Foulke, *op. cit.* § 396; Ronckendorff's Estate (1892) 11 Pa. C. C. 447 discussed Foulke, *op. cit.* § 397; Boyd's Estate (No. 1) (1901) 199 Pa. 487, 49 Atl. 297, discussed Foulke, *op. cit.* § 398; Fell's Estate (Pa. 1905) 14 D. R. 327; Hazard's Estate (Pa. 1916) 25 D. R. 226 reversed on ground of lack of jurisdiction in (1916) 253 Pa. 447, 98 Atl. 678; see excellent note on this case in 64 University of Pennsylvania Law Rev. 839; Cox *v.* Dickson (Pa. 1916) 25 D. R. 804. In Levenson *v.* Manly (1913) 119 Md. 517, 87 Atl. 261, *A* having under the will of her father who died in 1849, a life estate with unrestricted power of appointment by will only, conveyed certain property which was hers absolutely and not covered by the power, to trustees by deed in 1851, reserving a life estate with power of sale. *A* in 1867 united with the trustees in the conveyance of the same property upon the trust declared in the will of her father. *A* died in 1884 having appointed the property to her husband *X*, who was born in 1810, for life, and after his death in trust for her adopted daughter *C* who was born in 1864, for life, with power of appointment by will unrestricted. *C* died in 1894 and appointed to her husband *W*, who was born in 1859, for life and after his death for her children. The court held the appointment was good, recognizing the rule that the period ran from the time of the creation of the power. The only point in this case was as to the date of the creation of the power. The period clearly ran from the date of the second trust deed in 1867. The court, however, seems to think that it ran from the date of the death of *C* in 1884. However, it made no difference as the limitations were good from whichever period it ran. Gambrill *v.* Gambrill (1914) 122 Md. 563, 89 Atl. 1094.

same position as a donee of the power to appoint by deed or will, and that in such case, where there is no restriction as to objects, the period prescribed by the Rule against Perpetuities runs from the time of the exercise of the power in determining the validity of the limitations made by its exercise. The decisions in which this principle has appeared will next be examined.

In *Phipson* v. *Turner*,[77] *A* had power to appoint to her children and appointed to a daughter born at the date of the creation of the power, for life, and after her death to such persons as she should by will appoint, and in default of appointment, then to her sons. The daughter appointed to her husband absolutely, which was held a good appointment under the authority of *Bray* v. *Bree*.[78] The appointment, however, was clearly good, even if the period ran from the time of the creation of the power.

In the case of *In re Flower*,[79] testator gave an estate to his daughter for life without the power of disposal during her life, but with power at her decease to give it to whom she pleased. The daughter by will gave to her son for life and after his decease to the use of his children. There was a very short opinion and without any discussion the court held the power was testamentary only and on the authority of *Rous* v. *Jackson*[80] that the period prescribed by the rule ran from the time of the exercise of the power.

In *Rous* v. *Jackson*, the life tenant with power of appointment by will unrestricted as to objects exercised the power (by a will appointing to the trusts declared in a certain indenture) in favor of *A* for life then for *B* for life then to his eldest son in tail, in default of issue to *C* for life on the death of *C* to *X* for life with limitations over. *A* died, *B* died without issue and *C* died. It was held that *X* was entitled to the income which decided nothing as to the limitations over. The appointment to *X* was good even if the period ran from the time of the creation of the power because it was to a person living at the death of the donee of the power. The remarks of Chitty, J., as follows, on page 526: "I can find no distinction between a case of a capacity to alienate existing by reason of a general power and a general capacity to alienate property," were dicta. It may be inferred from the argument of counsel on page 523, that the circumstances that the ap-

[77](1838) 9 Sim. 227.

[78](1834) 2 Cl. & F. 453, which, however, was not in point as it was a case of a power to appoint by deed or will. This case is frequently cited in the discussions without observing this distinction: *e. g.*—J. L. Thorndike, 28 Harvard Law Rev. 664, 665; A. M. Kales, 26 Harvard Law Rev. 64.

[79](1885) 53 L. T. [N. S.] 717, s. c. 55 L. J. Ch. 200.

[80](1885) 29 Ch. D. 521.

pointee of the power was unborn at the time of its creation created an erroneous idea that the appointment was bad if the period ran from the time of the creation of the power.

In *Stuart* v. *Babington*,[81] *A* the donee of a power to appoint by will unrestricted as to objects exercised the power so as to create limitations which would unquestionably be void if the period prescribed by the rule ran from the time of the creation of the power. The surviving trustee of the will of the donee of the power had committed a *devastavit*. The decree was made that the sum claimed be brought into court or in default a decree would be entered for the administration of the trustee's estate. All that was really decided therefore was that the trustees of the trust created by the exercise of the power were entitled to recover from the trustees under the will of the donee of the power, which did not really involve the validity of the limitations in the former trust as to their remoteness from the creation of the power as some of those limitations were good and the trustee would be entitled to the fund any how on that ground. Chatterton V. C. said that *Powell's Trust* was to be disapproved of and *Rous* v. *Jackson* and *In re Flower* followed. At 556 to 557 he said that—"The doctrine of remoteness does not apply to cases like the present whether the power be exercisable by deed only or by will only. The true distinction depends on the question whether the objects of the power are general or special. Where the objects are special in order to see whether the exercise of such a power is void for remoteness one must apply the test of reading the terms in which it is exercised into the original instrument by which the power was created; and if the gift would in the original instrument be within the rule against perpetuities it is void, but for the reasons I have stated this rule does not apply here."

It will be observed that in the two cases of *Phipson* v. *Turner*,[82] and *Rous* v. *Jackson*,[83] the appointments were good even if the period ran from the time of the creation of the power, and the remarks of the court, therefore, were dicta; that the case of *Stuart* v. *Babington*,[84] raised a question only of the title of the trustee to the trust fund, and is not, therefore, a very clear authority. This leaves only *In re Flower*[85] as a square decision

[81](1891) L. R. 27 Ir. 551.

[82](1838) 9 Sim. 227.

[83](1885) 29 Ch. D. 521.

[84](1891) L. R. 27 Ir. 551.

[85](1885) 53 L. T. [N. S.] 717.

in favor of the proposition that the period runs from the time of the exercise of the power.

The English judges who have said that the period runs from the time of the exercise of the power, were probably unconsciously influenced by the principle that the donee of a special power of appointment, who confers a life estate with a general power of appointment by will only, fully exercises the power, and releases the estate from the restrictions imposed by the creator of the power. It seems to have been assumed, without due examination, that the principle was the same when the Rule against Perpetuities was involved;[86] that since a power of absolute disposal by will was sufficient to clear the property from the restrictions as to objects, it was a sufficient ownership to stop the running of the period prescribed by the Rule against Perpetuities. The two cases are not the same. In the first case, it is simply a question of intention of the donor of the power, of whether his purpose in creating the power restricted as to objects is sufficiently observed when the donee appoints to the objects a life estate with general power of appointment by will only. It seems that it is.

In the case of the Rule against Perpetuities, however, there is no question of intention; it is a question of fact. Can the donee give himself the fee? The loose use of the phrase, *absolute power of disposal,* as describing a situation, which sufficiently fulfills the intention of the donor of the power, will not justify an application on analogy of the Rule against Perpetuities to the same state of facts, when the application of the rule invoked, is only proper in the case where there is in fact a power to dispose of the whole estate.

It is not a question of whether the donee is practically the owner. The question is, is he in fact the owner or may he be regarded as such an owner by way of fiction? That fiction cannot be entertained unless the circumstances are such that the donee might have made himself the owner, which he can only do when there is a power of appointment by deed as well as by will.[87]

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[86]See Gray, Rule against Perpetuities (3rd ed.) § 526a.

[87]The question has been discussed in the following articles: Mr. Kales, General Powers and the Rule against Perpetuities, 26 Harvard Law Rev. 64, argues that the period prescribed by the rule runs from the time of the exercise. Mr. Gray, General Testamentary Powers, and the Rule against Perpetuities, 26 Harvard Law Rev. 720, reprinted in appendix L., Rule against Perpetuities (3rd ed.) at p. 652, supports the view which he

When the power to appoint by will unrestricted as to objects is conferred on an unborn person, and the view is adopted that the period prescribed by the rule runs from the time of the creation of the power, the limitations under the power may arise on a remote contingency and will therefore be void.[88]

If, on the other hand, the period prescribed by the rule runs from the time of the exercise of the power, then the power cannot be exercised at a period remote from any time. The same principle therefore applies as has been referred to in the case of a power to appoint by deed or will conferred on an unborn person.

POWERS OF REVOCATION.

A power of revocation is a power reserved by the settlor of a trust to revoke the trust. Upon the revocation of the trust, a new interest will arise, either in the settlor or such other objects as he shall declare. Such a power is not exercisable by

took in the second edition of his book that the period prescribed by the rule runs from the time of the creation of the power, and Mr. J. L. Thorndike, General Powers & Perpetuities, 27 Harvard Law Rev. 705, supports Mr. Kales. The sole point in controversy between these learned commentators seems to be whether the donee of a life estate, with general power to appoint by will, is in fact an absolute owner. Mr. Kales supported by Mr. Thorndike takes the ground that the period runs from the time of the exercise of the power, because the donee is practically the owner, as he can at the moment of his death by virtue of the power do anything with the property that an absolute owner can do, to which Mr. Gray answers—that a man cannot in the eye of the law be at the same time alive and dead; that so long as he is alive the condition necessary for the exercise of the power is not fulfilled, and after he is dead he cannot be an appointee; that where a power to appoint by deed is given, the donor means that at some time on some condition the donee shall have the fee, it would be more accurate to say, may have the fee, if he so desires; but where he gives a testamentary power only he distinctly means that the donee shall not have a fee, more accurately, can never have the fee as long as he lives. To which it may be added that the donee of the power cannot cause the property to devolve on his heirs by dying without a will, unless the limitation is to his heirs in default of appointment. Mr. Kales, 26 Harvard Law Rev. 66, uses this rather remarkable illustration when he says: "For instance, if a donee were given a general power to appoint by deed or will when he reached thirty or married, it would be stupid to say that he was not practically the owner before he reached thirty or married, and, therefore, could not be practically the owner when he reached that age or married. In the same way, it will not do to say that because a donee is not practically the owner before his death, he cannot be practically the owner at the moment of his death." Mr. Kales is fencing with windmills. No one has appeared in the discussion stupid enough to make such an argument.

[88]Mr. Gray, Rule against Perpetuities (3rd ed.), § 475, says that the power is void. If, however, the exercise of the power is expressly confined within the period prescribed by the rule, the limitations may be valid if they vest in time. Gray, Rule against Perpetuities (3rd ed.) §§ 474B, 475, 476.

an owner of the fee but by a person having no interest in the property or an interest less than the absolute ownership. The limitations, therefore, under such a power arise out of the power not out of the ownership, and must be regarded as made by the donor of the power. The circumstance that the donor and donee are the same person, while at first sight confusing can make no difference to the principle involved. It seems, therefore, as if the period prescribed by the rule begins to run from the time of the reservation of the power, for which statement, however, no authority has been found.[89]

A distinction has been drawn between the power of revocation exercisable only by the settlor, and therefore limited to his life and a power exercisable by the settlor, and, for instance, his heirs, and thus exercisable at a period remote from the time of the reservation of the power. The power in the first case is said to be valid, and, in the latter case void. This involves the erroneous notion that the power may be remote. The power reserved to the settlor during his life only may be exercised so as to create limitations vesting at a period remote from the time of the reservation of the power.[90]

SUMMARY.

We may summarize the discussion as follows: The ulterior object of the Rule against Perpetuities is to promote alienability, which it accomplishes by destroying those future interests which do not vest within a certain period, and by so doing hastens the restoration of the property to its former condition of absolute ownership in one individual, the state of affairs most favorable to alienability. The Rule against Perpetuities is not called for unless the absolute ownership is split up into a series of estates,

[89] *Cf.* Lewis, Perpetuities, 565; Third Report, Real Property Commissioners (1833) 34; Genet *v.* Hunt (1889) 113 N. Y. 158, 21 N. E. 91, where the settlor reserved a life estate with power to dispose by will and it was held that under the provisions of the N. Y. Revised Statutes the period of lawful suspension of alienation ran from the time of the creation of the power. Heermans *v.* Robertson (1876) 64 N. Y. 332, where there was a conveyance in trust for sale reserving a life estate with power of disposal by will and no clause of revocation. A subsequent sale by the grantor to a third party was held in a controversy between the trustee and third party to vest a good title as against the trustee because it operated in equity as an enforcement of the trust.

[90] In Grange *v.* Tiving (1665), O. Bridgman 107, a power of revocation was reserved and exercised at apparently a period remote from the date of reservation, and no question of the application of the Rule against Perpetuities was raised, which is not surprising in view of the early date of the case.

and the period prescribed by the rule begins to run from the time the absolute ownership is divided, and a new period cannot start until the fee has been restored to its former condition, which restoration may be accomplished in fact or by way of fiction.

Some of the future estates may arise by the execution of a power, which may be exercised to create a link in the chain of limitations or may be exercised independently of and without any effect on the limitations.

The Rule against Perpetuities, therefore, applies to the interest created by the power and not to the power, and it is inaccurate and confusing to speak of a power as void because remote. The question in considering the application of the Rule against Perpetuities to limitations arising under the exercise of the power is whether the period prescribed by the rule runs from the time of the creation of the power or from the time of its exercise.

A destructible power is a power exercisable as to a legal title, which title is subject to the uncontrolled disposition of the absolute owner, and therefore the power exists only by the sufferance of such owner. All limitations made by the exercise of such a power are regarded as made by the absolute owner, and their validity is judged by the remoteness from the time of the exercise of the power.

Powers may be classified as follows: (a) Powers in an executor. (b) Powers in a trustee. (c) Powers in trust. (d) Powers of appointment. (e) Powers of revocation.

(a) POWERS IN AN EXECUTOR.

Powers in an executor may be regarded as destructible by those having a vested interest under the will, if such interest vests within the period prescribed by the rule. In such a view, the period prescribed by the rule will run from the time of the exercise of the power. On the other hand, such powers may be regarded, from the nature of the objects they serve as exercisable only within a certain period after the testator's death. In this view the period prescribed by the rule runs from the time of the creation of the power, and since such powers will rarely be exercisable except within a reasonable period after the testator's death, which reasonable period will generally be twenty-one years, the limitations made by the exercise of the power will be valid if they vest within the period prescribed by the rule measuring from the time of the creation of the power.

(b) POWERS IN A TRUSTEE.

Powers in a trustee may be exercisable as to the equitable title or as to the legal title, and a distinction may be drawn between the two cases. Powers over the equitable title are powers to change or create limitations, while the ownership of the property is in the divided condition created by the donor of the trust, and therefore the validity of the limitations made by the exercise of such powers are to be judged by the remoteness from the time of the creation of the power. Where the power is over the legal title, its exercise has no effect on the limitations of the trust. It is not a power which is exercised to create any estate during the split-up condition of the ownership. When such a power is limited to be exercised within the period prescribed by the Rule against Perpetuities, dating from the time of the creation of the power, it is universally agreed that the limitations made by its exercise are valid if they vest within the same period.[91] No case has arisen of a limitation created by the exercise of such a power vesting beyond such period.

Where the power over the legal title is exercisable at a period remote from its creation, it has been generally assumed in practice that the limitations created by its exercise are valid without any statement of the time from which the period prescribed by the rule begins to run. No case has arisen on the point, and strong argument has been made that the limitations created by the exercise of such a power are void, apparently on the assumption that the period prescribed by the rule runs from the time of the creation of the power. This argument seems to assume that such a power exercisable during the continuance of a lawful trust extending into the remote period will be void without explaining the inconsistency.

It is submitted that the true view is that the period prescribed by the rule runs from the time of the exercise of the power because no limitations or interest in the property are created, and those limitations which have been created by the donor of the trust or may be created by his authority are unaffected.

A power to lease does not authorize the creation of any limitation of the estate and really operates to make the lease binding against a title vesting after the expiration of the title of the party making the lease. The period, therefore, runs from the time of

[91] This, however, is not the statement in the books. It is generally said that the power is valid.

the exercise of the power. The notion that a long lease violates the Rule against Perpetuities is obviously entirely without weight.

(c) POWERS IN TRUST.

A power in trust is where property is directed or authorized to be sold and a disposition made of the proceeds. It is clear in this case that the period prescribed by the rule runs from the time of the creation of the power because the disposition of the proceeds is a gift of the donor of the power. The law on this point is perfectly clear.

(d) POWERS OF APPOINTMENT.

A power of appointment may be restricted as to the objects in favor of which it may be exercised or it may be exercisable in favor of anyone. A distinction is to be drawn between the two cases. Where the power is restricted as to objects, the donee of the power is considered as making limitations by authority of the donor of the power and the period prescribed by the rule runs from the time of the creation of the power. Where, however, the power is unrestricted as to its objects, a distinction is to be drawn between the case of a power exercisable by deed or will and a power exercisable by will only. Where the power is exercisable by deed or will, the donee of the power can give himself the entire interest by exercise of a power of appointment by deed. He is therefore regarded by way of fiction as being the absolute owner and as having done that which he might have done, unless he in fact by deed appoints otherwise. When, therefore, he exercises the power by will, he exercises a power which exists only by his sufferance as an absolute owner, and the period prescribed by the rule runs from the time of the exercise of the power, and if, he by deed in his lifetime, appoints an estate less than an absolute estate, he has not given himself the fee, and the period prescribed by the rule runs from the time of the creation of the power.

Where the power is exercisable by will only, a difference of opinion exists. It is sometimes said that the donee of the power is an absolute owner and as such in the same position as the donee of a power exercisable by deed or will, and the period should therefore run from the time of the exercise of the power. This is probably the law in England. The cases in this country are

uniformly to the effect that the period runs from the time of the creation of the power.

(e) POWERS OF REVOCATION.

A power of revocation is clearly a power exercisable by delegation of the donor of the trust. He reserves to himself by grant a power to create or effect limitations, and since such a power springs from the deed of trust, it is dependent on it, and the period prescribed by the rule runs from the time of the creation of the power, which, in these cases, will always be from the date of the deed of trust, since a power of revocation cannot be created by will.

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THE COLORADO WATER RIGHT.*

The formal judicial and legislative abrogation of the common-law riparian right, and the concurrent adoption of a doctrine of property in inland streams under the sanction of the appropriation of their waters to beneficial use, first occurred in Colorado. The usages growing out of the early judicial opinion in that state, as developed by an unbroken line of supporting decisions, constitute what is known as the *Colorado system* of irrigation law.

The legal inception of the Colorado system resides in the decision of the territorial supreme court in *Yunker* v. *Nichols* in 1872.[1] Yunker brought an action of trespass on the case against Nichols for diverting all the water from a jointly constructed irrigation canal passing from Bear Creek through the defendant's farm to that of the plaintiff.[2] The trial court held with the common law—that the right to have water flow over the land of another is an interest in the land and that a contract for such right-of-way lies under the Statute of Frauds—and found for the defendant, the agreement not having been reduced to writing. Upon appeal, however, the three justices of the appellate court were unanimous in the opinion that the lower court should be reversed, but each judge based his opinion upon a different cause.

Chief Justice Hallett believed that the territorial statute of 1861 conferred upon persons owning land "on the bank, margin, or *neighborhood* of any stream of water" a right-of-way over adjacent lands for purposes of irrigation.[3] He asserted that this statutory right withheld from a land owner that absolute dominion over his estate which could deny others permission to enter upon it for the purpose of conveying water to be used in irrigation. *The statute, argued Justice Hallett, was justified on the ground of climatic conditions and resulting economic necessities, and a grant of right emerged from the statute.*[4]

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*To be published in the forthcoming book of the author, "Irrigation Water Rights".

[1](1872) 1 Colo. 551.

[2]The canal had been constructed in 1871 by Yunker, Nichols, and John Bell, under a verbal agreement to share equally in the water conveyed thereby. Subsequently, Nichols, having a riparian estate, consumed all the water so that none passed down to Yunker whose lands were below.

[3]Colo. Rev. Stat. 363. "An Act to protect and regulate the irrigation of lands."

[4]Chief Justice Hallett's opinion was, in part, as follows:

"In England, and in this country, it is considered that the right of one person to conduct water over the land of another is an interest in real

Justice Belford found even broader grounds upon which to reverse the lower court. In his opinion, the verbal contract between Yunker and Nichols was construed to be a parol license amounting to an easement in favor of Yunker upon the estate of Nichols. He held the privilege to be revocable, as to future enjoyment, but that, having been granted upon consideration of money and labor expended, and being partly executed, it should be enforced when adequate compensation in damages could not be obtained.[5] Furthermore, Justice Belford found authority in the act of 1861 for supporting the opinion of his colleague, Chief Justice Hallett. But the constitutionality of that act being questioned at the time, *his opinion dwelt at length upon the economic necessities of the country which brought about its enactment and justified its validity.*[6]

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estate, which must be conveyed by deed in compliance with the terms of the statute of frauds. * * *

"The principles of the law are undoubtedly of universal application, but some latitude of construction must be allowed to meet the various conditions of life in different countries. * * * The principles of the decalogue may be applied to the conduct of men in every country and clime, but rules respecting the tenure of property must yield to the physical laws of nature, whenever such laws exert a controlling influence.

"In a dry and thirsty land it is necessary to divert the waters of streams from their natural channels, in order to obtain the fruits of the soil, and this necessity is so universal and imperious that it claims recognition of the law. The value and usefulness of agricultural lands, in this territory, depend upon the supply of water for irrigation, and this can only be obtained by constructing artificial channels through which it may flow over adjacent lands. These artificial channels are often of great length, and rarely within the lands of a single proprietor. * * * Of course, lands situated at a distance from a stream cannot be irrigated without passing over intermediate lands, and thus all tilled lands, wherever situated, are subject to the same necessity. In other lands, where the rain falls upon the just and the unjust, this necessity is unknown, and is not recognized by the law. But here the law has made provision for this necessity, by withholding from the land owner the absolute dominion of his estate, which would enable him to deny the right of others to enter upon it for the purpose of obtaining needed supplies of water. * * *

"Where the lands of this territory were derived from the general government, they were subject to the law of nature, which holds them barren until awakened to fertility by nourishing streams of water, and the purchasers could have no benefit from the grant without the right to irrigate them. It may be said that all lands are held in subordination to the dominant right of others, who must necessarily pass over them to obtain a supply of water to irrigate their own lands, and this servitude arises, not by grant, but by operation of law * * *." 1 Colo. 552-555.

[5] *Ibid*, 564.

[6] In concluding his opinion, Justice Belford said: "I am fully aware that courts should be slow to justify their decisions on the ground of necessity; but I am equally conscious of the fact that they will betray their trust if, in the administration of law or in the expounding of constitutional principles, they shut their eyes and refuse to recognize those conditions of society which call into force and operation principles whose existence and recognition cannot be disregarded without bringing ruin on

Justice Wells reversed his own opinion, previously rendered in the circuit court, but also dissented, in part, from the opinion of each of his associates. He refused to hold with Justice Belford on grounds of estoppel and performance of a partially executed contract. In so far as it was sought to rest the case upon the Statute of 1861, he disagreed with both Justice Hallett and Justice Belford, and maintained that the *rights of appropriation and way over the lands of another for purposes of irrigation arose out of the necessities of climate and soil and were independent of legislative action.* In concluding his opinion he said: *"It seems to me, therefore, that the right springs out of the necessity, and existed before the statute was enacted, and would still survive although the statute were repealed. If we say that the statute confers the right, then the statute may take it away, which cannot be admitted."*[7]

The case of *Yunker* v. *Nichols* is noteworthy as the legal foundation of the Colorado system. However, it failed to give the property right which it recognized and sought to establish that degree of security which would have resulted had the members of the court concurred in a single opinion. *The unanimity of the court in the conclusion that the arid soil and climate of necessity established the right of a non-riparian proprietor to take and convey water from a stream across the estate of another for purposes of irrigation is however fundamentally significant. From this rule of reason, so strongly defended by the entire court was developed the subsequent justification of the abrogation of the*

all. As has been well said by another, the law is not a system marked by folly, based on bald sentences without reason; it is a grand code, founded on the necessities of men, erected by mature judgment, gradually expanding in beneficence and wisdom as time progresses, and regulating with care the interest of society and civilization." *Ibid,* 569.

[7] *Ibid,* 570. Italics are the writer's.

The following extract is significant of the attitude of Justice Wells: "I conceive that, with us, the right of every proprietor to have a way over the lands intervening between his possession and the neighboring stream for the passage of water for the irrigation of so much of his land as may be actually cultivated is well sustained by force of the necessity arising from local peculiarities of climate; as in other countries, out of a like necessity, every proprietor has a way of right to his own close over the premises which shut it from the highway. But it appears to me that this right must rest altogether upon the necessity rather than upon the grant which the statute assumes to make. For in other countries, where the necessity does not exist, the right has not been recognized in the courts nor attempted to be confirmed by statute, and, where similar legislation has been attempted, in the instance of private ways, by statute, it has been held to be either void as an appropriation of private property to individual uses, * * * or else has been sustained as the regulation of an existing right, and not as conferring one." *Ibid,* 570.

common-law doctrine of riparian rights, and the substitution therefor of an institution of property in the use of water grounded upon economic necessity. It is also noteworthy that a rationalistic justification of an invasion of that absolute right in private property which denies expeditious utilization of natural resources is consequent to the decision of the court.

The question of the relativity of the respective rights of riparian and non-riparian proprietors did not appear in *Yunker* v. *Nichols,* and, in this respect, the rule there established was incomplete. Ten years passed before a case directly involving such interests brought the issue between riparian and non-riparian claimants before the state supreme court.

The Constitution of Colorado formally abrogated the common-law water right in that state in 1876. Both before and after the adoption of the constitution, considerable irrigation law was enacted in sole recognition of the doctrine of appropriation. For several years, such legislation was not subjected to judicial review, and the rights of both riparian and non-riparian claimants whose diversions for irrigation and mining antedated both the statutes and the constitution remained unadjudicated.

The issue was brought before the supreme court of the state in 1882, and it was clearly affirmed that property in the use of the natural waters of the state should rest upon the fact of their appropriation to a beneficial use, and that the rule of the common law should be of no effect.[8] The case arose from the interference, by riparian proprietors upon St. Vrain Creek, with the diversion of the waters of the stream by the Left Hand Ditch Company. Both parties claimed the water for irrigation. The defendants based their claim upon the proprietorship of riparian lands, and the ditch company asserted ownership by virtue of lawful diversion and prior appropriation for beneficial use.[9] The riparian proprietors claimed that the common law prevailed in Colorado before the adoption of the constitution in 1876, that the doctrine of appropriation was nowhere recognized until the federal act of 1866 so stipulated, and that they had established a riparian right to irrigate

[8]Coffin *v.* Left Hand Ditch Co. (1882) 6 Colo. 443.

[9]The contrast in the grounds for the alleged rights is especially clear in this case because of the fact that, in their appropriation of the stream, the company conveyed the water from the valley of the St. Vrain and across a divide into the bed of James Creek, thence into Left Hand Creek, and therefrom by ditches to tributary lands. This situation precluded the possibility of redefining or interpolating in an attempt to bring the diversion under the common law.

their lands adjacent to the St. Vrain by settlement thereon at a time which antedated both of these enactments. They asserted absolute title, in fee simple, ("than which, none other was known to the law under which their patents were confirmed") together with all easements and appurtenances, and without reservation or exception of any ditches or water rights. In reaching its conclusions, the court made no reference to the precedent established ten years before in *Yunker* v. *Nichols,* but based its decision upon the facts of climatic conditions and the rule of economic expedience, as acknowledged by Congress in 1866 and supported by the United States Supreme Court in 1879.[10]

The following excerpts from the opinion of the Supreme Court of Colorado, in *Coffin* v. *Left Hand Ditch Company*[11] will serve to reveal the reasoning upon which the common-law doctrine of water rights was abrogated in Colorado.

"But two important questions upon the subject of water rights are fairly presented by the record, and we cannot well avoid resting our discussion upon them.

"It is contended by counsel for the appellants that the common-law principles of riparian proprietorship prevailed in Colorado until 1876, and that the doctrine of priority of right to water by priority of appropriation thereof was first recognized and adopted in the constitution. But we think the latter doctrine has existed from the date of the earliest appropriations of water within the boundaries of the state. The climate is dry, and the soil, when moistened only by the usual rainfall, is arid and unproductive; except in a few favored sections, artificial irrigation for agriculture is an absolute necessity. Water in the various streams thus acquires a value unknown in moister climates. Instead of being a mere incident to the soil, it rises, when appropriated, to the dignity of a distinct usufructuary estate, or right of property. It has been the policy of the national, as well as the territorial and state governments, to encourage the diversion and use of water in this country for agriculture; and vast expenditures of time and money have been made in reclaiming and fertilizing by irrigation portions of our unproductive territory. Houses have been built and permanent improvements made; the soil has been cultivated and thousands of acres have been rendered immensely valuable, with the understanding that appropriations of water would be protected. Deny the doctrine of priority or superiority of right by priority of appropriation, and a great part of the value of this property is at once destroyed.

[10] Justice Miller in Broder *v.* Natoma Water & Mining Co. (1879) 101 U. S. 274.

[11] (1882) 6 Colo. 443, at 446, 447.

"The right to water in this country, by priority of appropriation thereof, we think it is, and has always been, the duty of the national and state governments to protect. The right itself, and the obligation to protect it, existed prior to legislation on the subject of irrigation. It is entitled to protection as well after patent to a third party of the land over which the natural stream flows, as when such land is a part of the public domain; and it is immaterial whether or not it is mentioned in the patent and expressly excluded from the grant.

"The act of Congress protecting in patents such right in water appropriated, when recognized by local customs and laws, 'was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one' (*Broder* v. *Natoma W. & M. Co.*, 11 Otto (101 U. S.) 274.)

"We conclude then, that the common-law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his lands, even though he makes no beneficial use thereof, is inapplicable to Colorado. Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict therewith. And we hold that, in the absence of express statutes to the contrary, the first proprietor of water from a natural stream for a beneficial purpose has, with the qualifications contained in the constitution, a prior right thereto, to the extent of such appropriation."

The two unanimous initial opinions of the Colorado court state very clearly the fundamental principles of the *Colorado water right,* namely, (1) *a usufructuary property right in natural waters sanctioned solely by prior appropriation to beneficial and necessary use,* and (2) *the absolute abrogation of riparian proprietorship, as such, in the use of non-navigable streams.* These cases have been followed and supported in Colorado until their principles are no longer disputed.[12]

In 1909, the Colorado Supreme Court finally characterized the origin and nature of the Colorado water right and, at the same time, marked the contrast between the Colorado and the California systems of irrigation law. A stubborn riparian claimant, having carried an appeal to the supreme court, provoked an unanimously adverse judgment expressed, in part, as follows:

"We are entirely satisfied that the sole question argued and submitted to the trial court by counsel on both sides, was whether

[12]Golden Land Co. *v.* Bright (1884) 8 Colo. 144, 6 Pac. 142; Hammond *v.* Rose (1888) 11 Colo. 524, 19 Pac. 466; Oppenlander *v.* L. H. Ditch Co. (1892) 18 Colo. 142, 31 Pac. 854; Kansas *v.* Colorado (1907) 206 U. S. 46, 27 Sup. Ct. 655; Sternberger *v.* Seaton Mining Co. (1909) 45 Colo. 401, 102 Pac. 168.

the common-law doctrine of continuous flow, under the facts disclosed by this record, exists in Colorado. At this late date it would seem to us, as it evidently did to the trial court, idle to make such contention in this state. The matter has long ago been set at rest. The authorities relied upon by the plaintiffs are those which sustain the so-called California doctrine, * * * in which, (*inter alia*) it was held that the common law, as to riparian ownership, was not abolished by any law of that state, but still existed there, side by side with the doctrine of appropriation. * * *

"This judgment (of the Colorado trial court), being in effect that the common-law doctrine of continuous flow of a natural stream is inapplicable to conditions in this state, and that, by necessary construction of our local customs, statutes and constitution, it is abolished, is affirmed."[13]

THE COLORADO DOCTRINE IN OTHER STATES.

That part of the Colorado system established in 1872 by the unanimous opinion of the Supreme Court in *Yunker* v. *Nichols,* and unanimously reiterated ten years later, and again finally in 1909, by the same court, has been virtually adopted by *all irrigation states and territories* of the United States.[14] It is true that judicial decisions in California and Montana appear to deny this assertion, but there is reason to believe that prevailing practice disregards much that may be read in these decisions.[15]

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[13]Sternberger *v.* Seaton Mining Co. (1909) 45 Colo. 401, 403, 408, 102 Pac. 168.

[14]In Yunker *v.* Nichols, it is to be noted that the opinion of Chief Justice Hallett was concurred in by his associates, and that opinion was alone sufficient to determine the cause in question. The additional grounds advanced by Associate Justices Belford and Wells were, in a sense, superfluous in that case; but they were contributory to the principles established in the later case, Coffin *v.* Left Hand Ditch Co., *supra,* and it is strange that they were not there cited.

[15]Congressman Needham, of California, testifying before the United States Supreme Court Commissioner, in Kansas *v.* Colorado (1907) 206 U. S. 46, 27 Sup. Ct. 655, said, in substance, that the doctrine of riparian rights had been departed from in California, since, under that doctrine, industrial development is difficult; that there had been a departure from the principles laid down in Lux *v.* Haggin because, at that time, the value of water was not realized, and that that decision has been practically reversed on subsequent occasions; and that "the doctrine of prior appropriation and the application of water to a beneficial use is, in effect, in force now in that state" (Transcript of Record, Vol. II, p. 285).

Elwood Mead, Chief of the Division of Irrigation and Drainage Investigations, U. S. Dept. of Agriculture, testified in the same suit as follows:

"While the courts have sustained the doctrine of riparian rights, and made it general in application in the state, as a matter of fact the streams in the western part of Nebraska are being used and diverted in accordance with the law that provides for their diversion under the doctrine of appropriation. No attention is paid to that decision (Supreme Court of Kansas upholding riparian rights in Clark *v.* Allaman (1905) 71 Kans. 706, 80 Pac. 571) in practice. Now you might take every state where the two

With the two exceptions of California and Montana, the *arid* states and territories have endorsed the principles of the Colorado system *in toto,* and not only have established a right to appropriate water, but have denied any riparian prerogative in the appropriation or use of streams.

Nevada confirmed the California system in 1872;[16] but after thirteen years' trial the common-law principle was abandoned and the supreme court declared the earlier precedent, in so far as it conflicted with the doctrine of appropriation, to be overruled.[17] Idaho embraced the doctrine of appropriation in 1890,[18] New Mexico and Utah in 1891,[19] Arizona in 1895,[20] and Wyoming in 1896.[21] Oregon, not strictly an arid state, seems reasonably to have longer retained the common-law water right and followed the general practice of California. But, by a thorough revision of water laws in 1909 and 1911, Oregon virtually abandoned the common-law doctrine for that of priority of appropriation and

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doctrines exist, and there is just the same explanation." Transcript of Record, Vol. II, p. 1422.

See also *infra,* note 17.

In Montana, it is held that the right to the use of running waters follows the ownership of riparian soil; but it is also said that the state has, of necessity, assumed the ownership, *sub modo,* of the streams of the state and "expressly granted the right to appropriate the waters of such streams, which right, if properly exercised in compliance with the requirements of the statutes, vests in the appropriator full legal title to the use of such waters by virtue of the grant made by the state as owner of the water." Smith *v.* Denniff (1900) 24 Mont. 20, 22, 60 Pac. 398.

The legislature of California, in 1911, became fearful of the possible diversion in Arizona of the waters of Lake Tahoe which lies partially within each state, and paradoxically declared that "All the water or the use of water within the state of California is the property of the people of the State of California." Amendment to Civil Code Sec. 1410 (April 8, 1911), Stat. of 1911, p. 821.

[16]Vansickle *v.* Haines (1872) 7 Nev. 249.

[17]Jones *v.* Adams (1885) 19 Nev. 78, 6 Pac. 442; Walsh *v.* Wallace (1902) 26 Nev. 299, 67 Pac. 914; Twaddle *v.* Winters (1906) 29 Nev. 88, 85 Pac. 280.

In the latter case the court denounced the dual system of California in the following terms: "The California decisions cited for appellants may no longer be considered good law even in the state in which they were rendered." At p. 106.

[18]Drake *v.* Earhart (1890) 2 Idaho 750, 23 Pac. 541; Krall *v.* United States (1897) 79 Fed. 241.

[19]Trambley *v.* Lutherman (1891) 6 N. Mex. 15, 27 Pac. 312; Stowell *v.* Johnson (1891) 7 Utah 215, 26 Pac. 290.

[20]Chandler *v.* Austin (1895) 4 Ariz. 346, 42 Pac. 483.

[21]Moyer *v.* Preston (1896) 6 Wyo. 308, 44 Pac. 845; Willey *v.* Decker (1903) 11 Wyo. 496, 73 Pac. 270.

beneficial use.[22] In all of these judicial opinions and statutes the policy was based upon the grounds of economic necessity, as reflected in early customs in mining and irrigation, as recognized by Congress in the acts of 1866 and 1870,[23] and as approved by the Supreme Court of the United States.[24] Moreover, the courts universally recognized the Colorado cases, including *Coffin* v. *Left Hand Ditch Company*,[25] as having established and defined the priority right.[26]

THEORY OF THE COLORADO WATER RIGHT.

In Colorado, Nevada, and Utah, the natural waters within the state are declared to be the *property of the public*,[27] and in Wyoming, Idaho and Oregon,[28] to be the *property of the state*. Furthermore, *judicial law* in these states in the beginning, authorized grants of usufructuary rights in streams by the state to private persons, such grants being conditioned only upon priority of appropriation and a beneficial use, and the word of the courts has been in each state subsequently enacted into statutory or constitutional law. Just what construction the enacting legislatures and conventions of these states would have put upon the term *property*

[22]Amendment to Civil Code; laws of Oregon 1909, Ch. 216; Irrigation Dist. Law 1911, Ch. 223.

"Starting in with the adoption of the strict rule or the common-law theory of riparian rights, even as to undiminished flow of the water in the natural streams, the statutes enacted at various times as the needs and necessities of the state became more and more apparent, have gradually invaded that rule until, as to the use of the waters for all beneficial purposes, there is very little left of that ancient exposition of the law of waters in the State." Kinney on Irrigation (2d ed.) 3508.

The opinion of the Supreme Court of Oregon in Hough *v.* Porter, 51 Oregon 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728, in January, 1909, clearly defined and established the non-riparian principles which were enacted into statute a few weeks later.

[23]Rev. Stat. §§ 2339 & 2340.

[24]Broder *v.* Natoma Water & Mining Co. (1879) 101 U. S. 274; Kansas *v.* Colorado (1907) 206 U. S. 46, 27 Sup. Ct. 655.

[25]*Supra*, note 8.

[26]"In all the arid states following the 'Colorado System' and sustaining the doctrine of appropriation as against the common-law doctrine of riparian rights, the law has become well settled and litigants are not inclined to raise nor the courts to listen to any other contention. Its beneficient results have now been demonstrated by more than thirty years of continuous practice, and the property interests that have developed under it now amount in value to hundreds of millions of dollars." Mills, Irrigation Manual, 43.

[27]Constitution of Colorado, Art. 14, § 5; Statutes of Nev., 1903, p. 24; Statutes of Utah, 1905, Ch. 108.

[28]Constitution of Wyo., Art. 8, § 1; Idaho Civil Code of 1901, § 2625; Amendment to Civil Code of Oregon, § 10, 1911.

of the public (*or state*) is uncertain; but if they had any one purpose clearly in mind it was the recognition of the existence of an actual or potential *property-object* (*Eigenthumsobjeckt*)[29] in the streams within their boundaries, which was previously unknown to the national statutes or the common law, and which was unused and unappropriated, and, in fact, unclaimed and unrecognized, by the United States as the original land-owner under our government. In order to endow the irrigation right with the complete attributes of property, it was necessary not only that streams should have value and that they should be appropriable to beneficial use, but that they should be *legally acknowledged as objects of property*. The value of the streams resulted spontaneously from the conditions of utility and scarcity of flowing waters in an arid country, but their property qualification could only be made complete by legislative enactment or judicial recognition. This, the Colorado law attempts properly to do.[30] The theory of the law is that such property attributes as emerged from appropriability, high utility, and comparative scarcity of streams of water in an arid climate lacked the complementary property attribute of *legal acknowledgment*, and, in the absence of such acknowledgment, were unowned and, indeed, unclaimed by proprietors of the land over which the streams passed. Whatever the wording of the law, it may rightly be regarded (1) *as a recognition of an appropriable use in the streams of the state*, (2) *as a provision for the granting of that use as a public trust to private persons, and* (3) *as authority for the administration of that trust by public agents operative within the locus of its existence.*

In the arid regions, water is not an incident to and inseparable from the soil, but by nature is segregated from the land, and acquires an individuality among the cooperating forces of industry almost as distinct as is that of labor or capital. In theory, therefore, property in water is the right to appropriate the actual resources of the streams to reasonably useful purposes, and the

[29] Property objects have been well defined as material things having value, which are capable of appropriation, which have separate existence, and which are recognized by the law as objects of property:

"Eigenthumsobjeckte sind alle sächlichen Gegenstande, welche aneignungsfähig sind, eine abgesonderte Existenz haben, irgend welchen Werth haben (Sachguter sind) und von der Rechtsordnung als Eigenthumsobjeckte anerkannt sind." Samter, Das Eigenthum, S. 4.

[30] It has elsewhere been observed by the author that both the Constitution and Civil Code of California weakly acknowledged property qualifications of the waters of the state beyond the knowledge of the common law; but the supreme court of the state has in each instance invalidated the enactment. 5 California Law Rev. No. 2.

object of its administration is a thrifty and harmonious socio-economic development.[31]

The theory underlying the Colorado system refuses to recognize preexisting law as the sole legitimate source of property rights; but asserts that property finds its origin in relations between men and things, or society and the resources of its environment as affected by its wants, or more especially its necessities.

As to the common-law riparian right, the Colorado law denies the possibility of its existence under an irrigation economy, and, indeed, denies its ever having existed on the non-navigable streams of arid America. The last assertion seems to be doubly supported. A riparian right, as contemplated by the common law, would be without utility and, consequently, unappropriable in an arid land. Even if such were not true, the broader and superior utilities realizable and recognized under the priority and beneficial-use principle preclude the co-existence of the riparian principle—the first, by its nature, excludes the second. Furthermore, the theory asserts that the common-law right never did prevail nor command recognition upon the lands in question, and that the United States, as grantee from Mexico and France, was not vested with riparian rights and cannot confer such rights upon subsequent grantees. It is not contended that the common law, as a whole, should be abrogated. But it is held that a part of the legal fabric which grew out of the social and economic relations of a humid environment is unsuited to a more complex economy and an arid habitat; and that necessity and economy demand the abandonment of the riparian doctrine and the erection of a property right in the use of natural waters which shall be compatible with the material welfare and progress of society.

Justice Helm, answering the contention of the prevalence of the riparian right prior to 1876, in an opinion for the supreme court of Colorado, set forth the peculiar climatic and economic conditions and the consequent unfitness of the common law of

[31] "The right to the enjoyment of water for a beneficial use is not confined to the particular land where the water is first applied; it may be alienated, independently of the land, and changed from place to place, with the single limitation that the change shall not injuriously affect the vested rights of others." Ironstone Co. *v.* Ashenfelter (1914) 57 Colo. 31, 140 Pac. 177.

"The right to the use of water depends upon the needs of the appropriator. In this respect the law makes no distinction between appropriators for irrigation, for domestic use, or for power. As to all these purposes where a valid appropriation is made the right (to appropriate) is limited only by the law of necessity." Comstock *v.* Larimer & Weld Co. (1914) 58 Colo. 186, 145 Pac. 700.

waters to prevail in that state. The substance of his argument supports the recognition of a doctrine in conflict with the common law because of "imperative necessity", it seeks to establish the fact of property in streams through recognition of their appropriability to beneficial use, and asserts that such use and doctrine have existed and have been recognized since the first appropriation of water within the state.[32] The same theory prevails in the judicial decisions and statutes of Wyoming. A leading opinion of the supreme court of that state contains the following—

"In this state on the other hand the common-law doctrine concerning the rights of a riparian owner in the water of a natural stream has been held to be unsuited to our conditions, and this court has declared that the rule never obtained in this jurisdiction (*Moyer* v. *Preston,* 6 Wyo. 308). It was said in the opinion in that case that 'a different principle better adapted to the material conditions of this region has been recognized. That principle, briefly stated, is that the right to the use of water for beneficial purposes depends upon a prior appropriation'. And, further, in explanation of the reasons for the existence of the new doctrine, it is said: 'It is the natural outgrowth of the conditions existing in this region of the country. The climate is dry, the soil is arid and largely unproductive in the absence of irrigation, but when water is applied by that means it becomes capable of successful cultivation. The benefits accruing to land upon the banks of a stream without any physical application of the water are few; and while the land contiguous to water, and so favorably located as naturally to derive any advantage therefrom, is comparatively small in area, the remainder, which comprise by far the greater proportion of our lands otherwise susceptible to cultivation, must forever remain in their wild and unproductive condition unless they are reclaimed by irrigation. Irrigation and such reclamation cannot be accomplished with any degree of success or permanency without the right to divert and appropriate water of natural streams for that purpose and a security accorded to that right. Thus, the imperative and growing necessity of our conditions in this respect alone, to say nothing of other beneficial uses, also important, has compelled the recognition rather than the adoption of the law of prior appropriation.' "[33]

The earlier decisions in Nevada followed the theory of the California precedents, namely, that the patentee of the government was vested with the riparian right of the common law in all streams and that subsequent proprietors succeed to that property.[34]

[32] Coffin *v.* Left Hand Ditch Co. (1882) 6 Colo. 443.

[33] Willey *v.* Decker (1903) 11 Wyo. 496, 515, 516, 73 Pac. 210.

[34] Vansickle *v.* Haines (1872) 7 Nev. 249, and cases there cited.

These decisions were overruled in 1885 upon the theory that the common-law doctrine of water rights was of no force because unsuited to natural conditions in that state.[35] The language of the Nevada court is, in part, as follows:

"Here the soil is arid and unfit for cultivation unless irrigated by the waters of running streams. The general surface of the state is table-land, traversed by parallel mountain ranges. The great plains of the state afford natural advantages for conducting water, and lands otherwise waste and valueless become productive by artificial irrigation. The conditions of the country and the necessities of the situation impelled settlers upon the public lands to resort to the diversion and use of waters. This fact of itself is a striking illustration and conclusive evidence of the inapplicability of the common-law rule."[36]

The supreme court of Arizona, in rendering its leading decision upon the nature of water rights, reviewed the antiquity of the practice of appropriation of water for use in irrigation, resulting from climatic necessity in that country, and continued in the following terms:

"Thus we see that this is the oldest method of skilled husbandry, and probably a large number of the human race have ever depended upon artificial irrigation for their food products. The riparian rights of the common law could not exist under such systems; and a higher antiquity, a better reason, and more beneficent results have flowed from the doctrine that all right in water in non-navigable streams must be subservient to its use in tilling the soil."

The opinion further asserts that the common law, in so far as it relates to the use of water, "has never been and is not now suited to conditions that exist here."[37]

The theory of the leading Utah decisions is apparent in the following quotation from a characteristic opinion of the supreme court of that state:

"Riparian rights have never been recognized in this territory, or in any state or territory where irrigation is necessary; for the appropriation of water for the purpose of irrigation is entirely and unavoidably in conflict with the common-law doc-

[35]Jones *v.* Adams (1885) 19 Nev. 78, 6 Pac. 442; Reno Smelting M. & R. Works *v.* Stephenson (1889) 20 Nev. 269, 21 Pac. 317; Twaddle *v.* Winters (1906) 29 Nev. 88, 85 Pac. 280.

[36]Reno Smelting M. & R. Works *v.* Stephenson (1889) 20 Nev. 269, 280, 21 Pac. 317.

[37]Clough *v.* Wing (1888) 2 Ariz. 371, 381, 17 Pac. 453.

trine of riparian proprietorship. * * * The legislature of this territory has always ignored this claim of riparian proprietors, and the practice and usages of the inhabitants have never considered it applicable and have never regarded it."[38]

The supreme court of Idaho refers to the common-law doctrine as the "phantom of riparian rights," and its theory of the priority property right is expressed in the following opinion:

"Whether or not it (the doctrine of appropriation) is a beneficent rule, it is the lineal descendant of the law of necessity. When, from the most energetic and enterprising classes of the east, that enormous tide of emigration poured into the west, this was found an arid land, which could be utilized as an agricultural country, or made valuable for its gold, only by the use of its streams of water. The new inhabitants were without law, but they quickly recognized that each man should not be a law unto himself. Accustomed, as they had been, to obedience to the laws they had helped to make, as the settlements increased to such numbers as justified organization they established their local customs and rules for their government in the use of water and land. They found a new condition of things. The use of water to which they had been accustomed, and the laws concerning it had no application here. The demand for water they found greater than the supply, as is the unfortunate fact still all over this arid region. Instead of attempting to divide it among all, thus making it unprofitable to any, or instead of applying the common-law riparian doctrine to which they had been accustomed, they disregarded the traditions of the past, and established as the only rule suitable to their situation that of prior appropriation. This did not mean that the first appropriator could take what he pleased, but what he actually needed, and could properly use without waste. Thus was established the local custom which pervaded the entire West and became the basis of the laws we have to-day upon that subject."[39]

The Idaho court has more recently emphasized its theory of property in water and the basis of appropriation in that state in the following terms: "Appropriators and users of water within this State will be required and commanded to so divert, use and apply the waters as to secure the *largest duty and greatest service* therefrom."[40]

Justice Elliott, of the Colorado Supreme Court, has admirably contrasted the riparian right of the common law with the priority water right under the Colorado system.

[38]Stowell *v.* Johnson (1891) 7 Utah 215, 225-6, 26 Pac. 290.

[39]Drake *v.* Earhart (1890) 2 Idaho 750, 754-5, 23 Pac. 541.

[40]Van Camp *v.* Emery (1907) 13 Idaho 202, 89 Pac. 752. Italics are the writer's.

"At common law the water of a natural stream is an incident of the soil through which it flows; *under the Constitution (referring to the Colorado constitution), the unappropriated water of every natural stream is the property of the public.* Under the common law the riparian owner is, for certain purposes, entitled to the exclusive use of the water as it flows through his land; *under the constitution the use of the water is dedicated to the people of the state subject to appropriation.* The riparian owner's right to the use of water does not depend upon user and is not forfeited by non-user; *the appropriator has no superior right or privilege with respect to the use of water on the ground that he is a riparian owner; his right of use depends solely upon appropriation and user; and he may forfeit such right by abandonment or non-user for such length of time as that abandonment may be implied.* A riparian proprietor owning both sides of a running stream may divert the waters therefrom, provided he returns the same to the natural stream before it leaves his own land so that it may reach the riparian proprietor below without material diminution in quantity, quality, or force; *the appropriator, though he may not own the land on either bank of a running stream, may divert the water therefrom and carry the same withersoever necessity may require for beneficial use, without returning it or any part of it to the natural stream in any manner. The appropriator may, under certain circumstances change the point of diversion as well as the place of application of the water; he has a property right in the water lawfully diverted to beneficial use and may dispose of the same separate and apart from the land in connection with which the right ripened to any one who will continue such use without injury to the rights of others."*[41]

In the light of judicial opinions in the arid states, it appears that the fundamental theory of existing law, in so far as the doctrine of appropriation is acknowledged, *recognizes an object of property in the use of natural waters peculiar to an arid environment,* and that an equitable and economic distribution of this use justifies a separate property right therein. It further appears that *such property is rightly considered to be of a dual nature; that is to say, it is a subject of both social and personal, or public and private, attributes.*

Property in streams for irrigation and mining purposes is deemed to be of a social nature in so far as public control is essential in facilitating the economical administration of natural resources and in realizing their proper social efficiency. It is considered of a personal nature in so far as the appropriation

[41]Oppenlander *v.* Left Hand Ditch Co. (1892) 18 Colo. 142, 148-9, 31 Pac. 854. Italics are present author's.

of streams to private use may serve the tenets of the prevailing social system and may be made to render the acknowledged benefits of private property when considered over the entire field of its application. *Such a theory denies the rationale of the perpetuity of law merely because of its past prevalence or beneficence, and assumes the organic source of the law to lie in the existing socio-economic order imposed, primarily, by conditions over which society has no control and, secondarily, by the recognized philosophy of the present social system.* The leading judicial decisions supporting the Colorado system are unanimous upon the point that necessity is the rule of their action, and that the rule of necessity eliminates the possibility of perpetuating the property right in natural waters which is defined by English law and which prevails in humid America.

Proceeding upon the hypothesis that water rights find their natural origin in the scarcity, usefulness, and appropriability of the waters of flowing streams, and that equitable appropriation and economic use imply a supervisory authority, *the arid states have virtually recognized a divisible property in the streams within their borders, thereby assigning the right of possession (appropriation and use) to private proprietors and the right of title (control) to the state. In this separation, the streams have been declared to be property of the public, and the qualified use thereof is made subject to private grant, the reservation of authority on the part of the grantor being sufficient to exercise a rigorous control over the use in the hands of the grantee.*

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DECEMBER, NINETEEN HUNDRED AND SIXTEEN.

With this issue, the COLUMBIA LAW REVIEW is establishing a department of current legislation, in which it is proposed to bring to the attention of readers such recent statutes as reflect important legislative tendencies, or are of general interest to the legal profession because of their imposition of extraordinary liabilities, their effect on large classes of business, or the sweeping social reforms which they inaugurate. It is believed that, with the rapidly increasing substitution of statutory for judge-made law, a progressive legal publication can no longer afford to neglect the legislative field; and in this department some of the striking and important measures will be from time to time reviewed, criticized, and compared.

NOTES.

BELLIGERENT INTERFERENCE WITH POSTAL CORRESPONDENCE.—The contentions of the memorandum of the Allied governments of February 15th, 1916, in reply to the request of the State Department that the inviolability of postal correspondence be respected, were as follows:[1]

[1]European War, No. 3, Diplomatic Correspondence Relating to Neutral Rights and Duties, 150.

(1) That from the standpoint of visit and search parcels post packages should not be treated differently from merchandise; (2) That the inviolability of postal correspondence under the 1st Article of the 11th Hague Convention of 1907 does not affect the right of the Allied governments to visit and search merchandise hidden in envelopes or wrappers contained in mail bags; (3) That they will continue not to seize and confiscate "genuine correspondence" but will insure its speediest possible transmission as soon as the sincerity of its character is discovered.

The United States agreed that parcels post mail might be treated as merchandise, assured the Allies that the two governments were in accord in principle, but objected to the arbitrary manner in which the principle was applied.[2] The whole controversy seemed to centre round the inviolability of what was called "genuine correspondence". The United States gave a list of contraband which the Allies could confiscate. In this class were placed negotiable instruments and securities. Money-order lists, shipping documents, even though relating to "enemy supplies or exports", unless carried on the same ship as the property referred to, were to be regarded as "genuine correspondence", and entitled to unmolested passage.[3] The reply to this communication under date of October 12th declared that the inspection of private mails to discover whether they contained contraband necessarily implied the opening of the covers and could not be carried on conveniently on the high seas.[4] It is on this point that the position of our government seems weak. Apparently our contention is that "genuine correspondence" is to be regarded as entitled to unmolested passage. How can it be possible to grant the right to stop contraband in envelopes and yet claim for "genuine correspondence" inviolability, thus implying that the seals of letters must not be broken?[5] The practice of nations had been in the direction of leniency in allowing immunity from search and seizure to mails[6] until the Russo-Japanese

[2] *Ibid.* 152.

[3] *Ibid.* 156.

[4] The British Ambassador to Mr. Lansing, Sec. of State.

[5] Dana, in a note to Wheaton's International Law, makes the broad statement that the law allows immunity from search to no deposit of information. He adds that the danger of granting immunity to postal correspondence would be that the neutral might carry despatches for the enemy or perform unneutral service under cover of this exemption. This shows that the immunity discussed meant immunity from search and not only from seizure. Dana's Wheaton, 659, n. 228 *et seq.*

[6] "Neutral non-commercial mail packets" were allowed to enter and depart from Tampico while under blockade by United States forces. Dana's Wheaton, 659, n. 228. During the Civil War a dispute arose with England about the mails on the Peterhoff, and Secretary Seward gave orders that "public mails of any friendly or neutral power should not be searched or opened" but put on their way, in case of capture of a merchant ship. 7 Moore, Digest, 481. France in 1870 declared that neutral mail sacks should not be searched provided that a mail agent of the neutral state swore to their innocuous character. C. Dupuis, Droit de La Guerre Maritime, 215. President McKinley at the beginning of the Spanish American War declared that voyages of mail steamers should only be interfered with on grounds of clearest suspicion of violation of blockade or carriage of contraband. 7 Moore, Dig. 480. England granted a similar indulgence to Germany during the Boer War. Lawrence, War & Neutrality in the Far East (2nd ed.) 190.

war of 1904. It is true that during that war the Russian government did cause a seizure and examination of mails on neutral ships,[7] but this action was criticised most severely as reactionary by at least two English writers.[8] While most publicists agreed that prior to the 11th Hague Convention of 1907 the custom of allowing exemption from seizure to mails had not ripened into obligatory law,[9] they are in accord as to the advisability of such a law. It is considered that the belligerent does not derive sufficient benefit from being permitted to open the mails in proportion to the damage done to innocent commercial relations.[10] The provisions of Article 1 of the 11th Hague Convention of 1907 were introduced at the suggestion of the German delegate, Herr Kriege, who declared that it was extremely desirable to shelter commercial interests and innocent correspondence from the disturbances of maritime warfare, and that it was hardly probable that belligerents would have recourse to postal service for the transmission of despatches, owing to the better method offered by telegraphy.[11] The Allied governments maintain that the first article of the 11th Hague Convention referred to above granted inviolability only to "genuine correspondence" or "missive letters".[12] Their contention then is that in searching mails and opening envelopes there is no violation[13] of the practice which the Hague Convention attempted to establish. This attitude is unsupportable, since in the search for contraband in the form of negotiable instruments or bonds the seals of "genuine correspondence" must necessarily be violated.[14]

Apparently a better position for our government from a purely legal standpoint would have been to declare in our note of May 24th, 1916, that the Allied governments had no right to interfere with sealed envelopes which did not clearly contain merchandise. In admitting

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[7]The Calchas (1904) 1 Russ. & Jap. Prize Cases, 118; 2 Oppenheim, Int. Law, 454.

[8]Lawrence, *op. cit.* 197; Higgins, Hague Peace Conferences, 402.

[9]Wheaton's Int. Law (5th English ed. by C. Philipson) 562; 2 Pitt Cobbett, Leading Cases on Int. Law, 174, Note C; 2 Oppenheim, *op. cit.* 453-4.

[10]Dupuis, *op. cit.* 215, n. 2; Lawrence, *op. cit.* 192; Higgins, *op. cit.* 401.

[11]Dupuis, *op. cit.* 215; Wehberg, Capture in War on Land & Sea, 90. The proposition met with practically unanimous acceptance, though Russia did not sign the Convention. Higgins, *op. cit.* 401. It is therefore not binding, as all the belligerents have not signed it. 11th Hague Convention of 1907, Art. 9.

[12]See note 1, *supra.*

[13]The Allied governments declared they were following the provisions of the Hague Convention, reasonably interpreted, but stated that as the Convention was not binding, see note 11, *supra,* they expressly reserved the right to depart from such practice in case enemy frauds and abuses made it necessary. British Ambassador to Mr. Lansing, Sec. of State, October 12th, 1916.

[14]See note 5, *supra.* This is also illustrated by the fact that several writers in speaking of the Hague Convention compared the loss to the belligerents arising from a denial of the right of search and the resultant advantage to neutrals. See note 10, *supra.* There certainly would be no question of loss as regards the belligerents if they were entitled to open envelopes in the search for contraband, since there would then be no restriction on the right of search. It must be noted carefully that the Hague Convention referred to did not exempt mail steamers themselves from search. 11th Hague Convention of 1907, Art. 9.

the right to search for negotiable instruments and securities, we have impliedly admitted the right to break the covers and delay the transmission of "genuine correspondence". Perhaps the answer of the State Department to the British communication of October 12th, which has not yet been given out, will make our position more clear and consistent.

War as Excuse for Failure to Perform Contract.—Whether the fact that a war has rendered impossible the performance of a contract will serve to excuse failure to perform it is, of course, dependent primarily on the proper formulation of the rule as to impossibility of performance in general. The difficulties attendant on the framing of any satisfactory rule are obvious; but a statement of the principle may perhaps be attempted as follows: impossibility of performance, *per se,* is never an excuse; but where, from all the circumstances of the case, the parties may be said to have intended that a condition be implied in fact, to the effect that the cause of the impossibility do not occur, then, the condition having been broken, performance is excused.[1] If, then, this be taken as the rule, performance of a contract rendered impossible by war will be excused only when the parties may fairly be said to have intended one of two conditions to be made a part of the contract: either (1) that performance be not rendered impossible by any cause whatever,—which, of course, would include war; or (2) that performance be not rendered impossible by certain specific causes, including war.[2]

Ordinarily, of course, no such condition is to be implied, and therefore, in the normal case, impossibility caused by war does not excuse failure to perform. This appears clearly where the undertaking is intended by the parties to be absolute.[3] Then, on the other hand, it is equally obvious that, where there is an express or implied affirmative term in the contract, impossibility caused by war will not serve as an excuse.[4] But whether, in any particular case, a condition is to be implied excusing performance when war makes it impossible, one is almost never implied where performance is merely rendered extremely

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[1] *Cf.* Anson, Contracts (11th ed.) 396; Wald's Pollock, Contracts (Williston's ed.) 520; 1 Columbia Law Rev. 529; 11 *id.* 83. For the general subject, see Trotter, Law of Contract During War, 54.

[2] Somewhat similar principles govern where the defense to an action on contract is based on the theory that the consideration for the defendant's promise has failed, since it is impossible, because of a war, for the plaintiff to perform his side of the contract. This class of cases is often confounded with the type of cases properly under discussion here, *viz.,* those cases where the defense is that it is impossible for the defendant to carry out his promise. They are really distinct, however. Paradine *v.* Jane (1648) Aleyn 26 (which is usually cited as the leading case on impossibility of performance, but is really a case of failure of consideration); Robinson *v.* L'Engle (1870) 13 Fla. 482, 495; *cf.* Leiston Gas Co. *v.* Leiston-cum-Sizewell etc. Council [1916] 2 K. B. 428; but *cf.* Bayly *v.* Lawrence (S. C. 1792) 1 Bay, 499.

[3] Jacobs, Marcus & Co. *v.* Crédit Lyonnais (1884) 12 Q. B. D. 589; Ashmore & Son *v.* Cox & Co. [1899] 1 Q. B. 436; *cf.* Hadley *v.* Clarke (1799) 8 T. R. 259.

[4] De Medeiros *v.* Hill (1831) 5 Car. & P. 182; Smith & Co. *v.* Morse & Co. (1868) 20 La. Ann. 220; *cf.* Geipel *v.* Smith (1872) 7 Q. B. 404.

difficult.[5] Moreover, where performance is only delayed, it will ordinarily not be absolutely excused, though the obligation to perform may be suspended.[6] This is well shown by the recent case of *Millar & Co.* v. *Taylor & Co.* (Ct. of App.) [1916] 1 K. B. 402. There the plaintiffs contracted to sell candy to the defendants for export. On account of the war, the export of confectionery was prohibited by Proclamation; ten or fifteen days later, the prohibition was removed. Meanwhile, the plaintiffs had canceled the contract. In an action brought by the plaintiffs, the defendant counterclaimed for breach of contract. It was held that the mere delay was insufficient to permit the plaintiffs to cancel the contract, especially as the plaintiffs' obligation was merely to deliver within a reasonable time, and this was perfectly possible.

On the other hand, it is obvious that, in some cases, the parties do intend a condition to be implied, which would excuse performance when that is rendered impossible by war. Thus, the parties may expressly or impliedly contract to be excused where performance becomes impossible, either from any cause, or from war in particular.[7] This situation occurred lately in the case of *Thaddeus Davids Co.* v. *Hoffman-LaRoche Chemical Works* (Sup. Ct. App. Term, 1916) 160 N. Y. Supp. 973, where the court construed the expression "contingencies beyond your control"—which gave the defendants a right to cancel —as including impossibility of obtaining the subject-matter of the contract from Germany, due to the war. This case is unquestionably correct. Where both parties to the contract have to act, and the acts of both are rendered impossible of performance by war, it is fair to imply such a condition,[8] since the parties can hardly be supposed to have contracted to pay each other damages. Normally, moreover, the parties intend to imply a condition that neither will contravene any domestic law, so that when a contract becomes illegal under domestic law, as, for instance, where performance would involve trading with the enemy, it is excused.[9] But ordinarily there is no condition not to disobey a foreign law; and therefore when, due to war, a foreign law makes performance impossible, it is not excused.[10] Substantially similar considerations, coupled with the fact that, where the performance of a contract is dependent upon the existence of a

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[5]Elsey *v.* Stamps (1882) 78 Tenn. 709; Richards & Co. *v.* Wreschner (1915) 156 N. Y. Supp. 1054, aff'd. 158 N. Y. Supp. 1129; see Graves *v.* Miami Steamship Co. (1899) 29 Misc. 645, 61 N. Y. Supp. 115; 10 Columbia Law Rev. 478. Where one of two alternatives becomes impossible, and performance thereof is excused, the defendant is still bound to perform the other alternative. Jacquinet *v.* Boutron (1867) 19 La. Ann. 30.

[6]Hadley *v.* Clarke, *supra*; Cohen *v.* N. Y. Mut. Life Ins. Co. (1872) 50 N. Y. 610; Mutual Benefit Life Ins. Co. *v.* Hillyard (1874) 37 N. J. L. 444, 470.

[7]Geipel *v.* Smith, *supra;* Reid *v.* Hoskins (1856) 4 E. & B. 979; 5 *id.* 729; 6 *id.* 953; *cf.* Marks Realty Co. *v.* "Churchills" (1915) 90 Misc. 370, 153 N. Y. Supp. 264.

[8]Ford *v.* Cotesworth (1870) 5 Q. B. 544; *cf.* Beale v. Thompson (1803) 3 Bos. & P. 405.

[9]Reid *v.* Hoskins, *supra;* see Mutual Benefit Life Ins. Co. *v.* Hillyard, *supra*; Esposito *v.* Bowden (1857) 7 E. & B. 763; 16 Columbia Law Rev. 588.

[10]Jacobs, Marcus & Co. *v.* Crédit Lyonnais, *supra;* Richards & Co. *v.* Wreschner, *supra;* see 10 Columbia Law Rev. 478.

specific thing, its continued existence is usually the subject of a condition,[11] normally excuse performance, if the subject-matter of the contract is requisitioned by the government.[12]

An interesting variation of the usual problems in this class of cases was presented by the recent case of *Mitsui & Co.* v. *Watts, Watts, & Co.* (Ct. of App. 1916) 115 L. T. R. 248. The defendants contracted to send a ship to Mariopol, and load a cargo for the plaintiffs, "restraints of princes" excepted. Erroneously thinking that the voyage was already illegal, defendants failed to perform, and claimed on the trial that a reasonable belief that the expected outbreak of the war would render such voyage illegal served to excuse them. It was held that a reasonable apprehension of something which, if it happens, will excuse performance, is insufficient as an excuse. It might, perhaps, have been argued that the defendants took the risk of events so occurring subsequently that they would have been absolved from complete performance even had they sent the ship to Mariopol, and that the risk had eventuated in their favor; but the court took the sounder view that the defendants were absolutely bound to perform their contract, unless legally excused prior to the time of breach.

Separation Agreements.—When the English Ecclesiastical Court, in which was vested jurisdiction over marriage questions, had to deal with separation agreements, it declared them wholly void as violative of the sacred nature of the marriage relationship,[1] and never during its entire history, until its abolition in 1857, did it grant to such agreements any sanction whatsoever.[2] The equity courts, on the other hand, did uphold them, even in the eighteenth century, at least to the extent of enforcing provisions for the separate maintenance of the wife,[3] since they considered themselves able to do this without coming into conflict with the ecclesiastical jurisdiction. It was not, however, until early in the nineteenth century that any clear rule was enunciated, and then it became settled in both law and equity courts that, where separation had in fact occurred, or was to occur immediately,[4] provisions made between the husband and a trustee for the wife[5] to insure her a separate maintenance were enforcible obligations, even where such stipulations were merely accessory to a main agreement for separation which was non-enforcible as against public policy.[6]

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[11]Wald's Pollock, Contracts (Williston's ed.) 536.

[12]*In re* Shipton, Anderson & Co. [1915] 3 K. B. 676; see Graves *v.* Miami Steamship Co., *supra.*

[1]Mortimer *v.* Mortimer (1820) 2 Hagg. Con. 310; Westmeath *v.* Westmeath (1827) 2 Hag. Eccl. Sup. 1, 115.

[2]See Foote *v.* Nickerson (1900) 70 N. H. 496, 498, 48 Atl. 1088.

[3]Seeling *v.* Crawley (1700) 2 Vern. *386; Angier *v.* Angier (1718) Pre. Ch. 496; Guth *v.* Guth (1792) 3 Bro. C. C. 614; see Fletcher *v.* Fletcher (1788) 2 Cox *99, *102; but see Foote *v.* Nickerson. *supra,* 500.

[4]If the agreement looked to a possible separation *in futuro* it was wholly void. Durant *v.* Titley (1819) 7 Price, 577; *contra,* Rodney *v.* Chambers (1802) 2 East, 283.

[5]The trustee was necessary because of the common law unity of husband and wife. See Legard *v.* Johnson (1797) 3 Ves. Jr. *352, *358.

[6]Worrall *v.* Jacob (1817) 3 Mer. 256; Jee *v.* Thurlow (1824) 2 B. & C. 547; Frampton *v.* Frampton (1841) 4 Beav. 287; see Warrender *v* Warrender (1835) 2 Cl. & F. 488, 527.

This anomalous doctrine, objected to by the very judges who decided the cases,[7] was finally eliminated in England as the result of a "judicial somersault".[8] The House of Lords in a notable case decreed specific performance of a separation agreement, one provision of which was that the wife was to live separate, and thus cleared the way for the enforcement in such agreements of that covenant which had from the very beginning, on the ground that it was against public policy to allow private interference with the marriage relationship, received no sanction from either the law, equity, or ecclesiastical courts.[9] Though it may be questioned how far this result was actually intended, the scope of the decision was later extended,[10] and in subsequent cases the new doctrine was applied in various ways[11] on the ground that the better public policy was to encourage the private settlement of marital difficulties.[12] Even the trustee was finally eliminated in the complete modernization of the doctrine.[13]

The American courts are in direct conflict with this present English theory and have always followed the earlier view.[14] The rule, as laid down in most of the jurisdictions, is that if a separation has occurred, or is to take place immediately, an agreement for separation will be enforced, if its provisions are fair and it is free from fraud or duress.[15] By this the judges seem to mean that any stipulation for separate maintenance in such agreements will be enforced, but it is clear on authority that the stipulation to separate or to continue to live separate will not be carried into effect by the courts.[16] With a few variations[17] this doctrine is law throughout the United States.

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[7]See Worrall *v.* Jacob, *supra;* Westmeath *v.* Westmeath (1821) Jac. Rep. 126, 142; Ross *v.* Willoughby (1822) 10 Price, 2.

[8]1 Bishop, Marriage, Divorce, & Separation, § 1263.

[9]Wilson *v.* Wilson (1848) 1 H. L. Cas. 538.

[10]In Wilson *v.* Wilson (1854) 5 H. L. Cas. 40, the second decision by the House of Lords on the leading case, the court supported an order approving a separation deed as drawn by the master, though it contained a clause to prevent suit by the husband for the restitution of conjugal rights, on the ground that such a clause was essential to protect the right of the wife to live separate.

[11]Husband enjoined from molesting wife, Sanders *v.* Rodway (1852) 16 Beav. 207; suit for restitution of conjugal rights enjoined, Hunt *v.* Hunt (1862) 4 DeG., F. & J. *221; Besant *v.* Wood (1879) 12 Ch. D. 605, where court also held agreement barred suit for judicial separation brought in violation of the contract; suit for restitution of conjugal rights barred, Clark *v.* Clark (1885) 10 P. D. 188.

[12]See Besant *v.* Wood, *supra,* 620.

[13]McGregor *v.* McGregor (1888) 21 Q. B. D. 424; Sweet *v.* Sweet [1894] 1 Q. B. 12.

[14]11 Columbia Law Rev. 378.

[15]Nichols *v.* Palmer (Conn. 1811) 5 Day, 47; Walker v. Walker (1869) 76 U. S. 743; Bowers *v.* Hutchinson (1899) 67 Ark. 15, 53 S. W. 399.

[16]Aspinwall *v.* Aspinwall (1892) 49 N. J. Eq. 302, 24 Atl. 926; Baum *v.* Baum (1901) 109 Wis. 47, 85 N. W. 122; see Smith *v.* Knowles (Pa. 1853) 2 Grant Cas. *413.

[17]A few jurisdictions require a sufficient cause for the separation. Stebbins *v.* Morris (1897) 19 Mont. 115, 47 Pac. 642; Boland *v.* O'Neil (1899) 72 Conn. 217, 44 Atl. 15; see Archbell *v.* Archbell (1912) 158 N. C. 408, 74 S. E. 327.

The requirement as to a trustee has varied in the different jurisdictions according as the power of married women to contract has varied.[18]

A recent application of the American doctrine is to be found in *Landes* v. *Landes* (1916) 94 Misc. 486, 159 N. Y. Supp. 586 (affirmed on different grounds, 172 App. Div. 758, 159 N. Y. Supp. 230), in which it was held that, where a wife had sued for separation, a separation agreement, though valid in its pecuniary features, could not bar the suit, seemingly because the wife had no such enforcible right to a separation as would make judicial action nugatory. The correctness of the decision depends upon whether the New York doctrine is like the general American position. It is clear that maintenance provisions are enforcible where the agreement is made, as it was here, after separation.[19] However, the status of the promise to separate is doubtful. If the court is correct that the stipulation concerning separation is invalid in New York,[20] then clearly an agreement could not obtain for the wife what she could obtain by judicial decree. If however, the English doctrine has been introduced,[21] then the wife, having had an election between the contract and the suit and having chosen to make the contract, ought, since she has an enforcible right to separation, to be held to her election and barred from suit. The question involved has received little attention in this state, but, taking into account the general American doctrine, as well as certain holdings in New York, indicative of a dislike of such agreements,[22] it seems unlikely that the courts would adopt the English view. This is regrettable, inasmuch as it would seem the better public policy to encourage a private settlement wherever possible, provided that the agreement did not in itself conduce to a separation *in futuro*. At any rate, the courts would in this way avoid the illogical position of enforcing stipulations for separate maintenance, which would never have been entered into except to facilitate the objectionable main purpose.[23]

Admiralty Jurisdiction Over Vessel Under Requisition by Foreign Nation.—A necessary adjunct of the idea of sovereignty is the principle that the state should not and cannot be sued in its own courts

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[18]See Archbell *v.* Archbell, *supra*.

[19]Galusha *v.* Galusha (1889) 116 N. Y. 635, 22 N. E. 1114; Winter *v.* Winter (1908) 191 N. Y. 462, 84 N. E. 382.

[20]Gilbert *v.* Gilbert (1893) 5 Misc. 555, 26 N. Y. Supp. 30; see Beach *v.* Beach (1842) 2 Hill 260, 264.

[21]*Cf.* Dowling, J., in Landes *v.* Landes (1916) 172 App. Div. 758, 159 N. Y. Supp. 230. Certain dicta seem to support the English view. See Pettit *v.* Pettit (1887) 107 N. Y. 677, 679, 14 N. E. 500; Duryea *v.* Gilvin (1890) 122 N. Y. 567, 570, 25 N. E. 908.

[22]In spite of the decision in Clark *v.* Fosdick (1889) 118 N. Y. 7, 22 N. E. 1111, the Appellate Division, *contra* to the American rule, has frequently refused to enforce even the maintenance provisions in an agreement where the separation in fact occurred immediately after the contract was made. Sunderlin *v.* Sunderlin (1908) 123 App. Div. 421, 107 N. Y. Supp. 979, and cases cited. Clark *v.* Fosdick is distinguished on the ground that the agreement was there between husband and trustee, and not between husband and wife.

[23]New Hampshire refuses to enforce any of the agreement. Foote *v.* Nickerson, *supra*, discussed in 1 Columbia Law Rev. 555; Hill *v.* Hill (1907) 74 N. H. 288, 67 Atl. 406. This was the rule in North Carolina, Collins *v.* Collins (1867) 62 N. C. 153, but it has been changed by statute. See Archbell *v.* Archbell, *supra*.

without its consent.[1] One expression of this idea running through English law is the maxim "the king can do no wrong". Similarly, sovereigns have by comity and the law of nations been granted immunity from the jurisdiction of the courts of foreign sovereigns, though according to general principles of jurisprudence a court's jurisdiction is founded on the presence of the person or property within the state.[2] This exemption extends not only to the person of the sovereign and his ambassadors but to his property, at least so far as it is within his control and connected with his public functions.[3]

The same principle has been followed in a suit *in rem* against the public property of a foreign nation,[4] notably in the case of libels in admiralty against foreign warships and other public ships of foreign governments, in which cases the courts have declined to exercise their jurisdiction gained by the attachment of the ship.[5] An apparent exception to this immunity is in the case of a libel *in rem* to recover for salvage against the property of a foreign government, although destined for public use, when at the time of seizure the property was not actually in public service or in the possession of an officer of the government.[6] The theory of this exception is that the action may be maintained without disturbing the possession of the government.[7]

Thus the question of the actual possession of the government seems to be the touchstone of all the cases, and what constitutes such possession has become a question of great importance in connection with the now prevalent practice of requisitioning all merchant ships by the various belligerent powers. When a nation requisitions a trading vessel, directs it to go to a certain port for a certain cargo and return with it to a port indicated by the government for a stipulated remuneration, but places no officer on board and leaves the entire navi-

[1]Young *v.* SS. "Scotia" [1903] A. C. 501; see Briggs *v.* Light-Boats (1865) 93 Mass. 157.

[2]Bynkershoek, Opera Minora (ed. 1752) 435.

[3]Magdalena Steam Nav. Co. *v.* Martin (1859) 2 E. & E. 94; "One sovereign, being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication and will be extended to him." The Exchange (1812) 11 U. S. 116, 137; see The Santissima Trinidad (1822) 20 U. S. 283. Even though the sovereign is living within the territory of another state incognito, he may at any time resume his foreign personality with its appurtenant immunities. Mighell *v.* Sultan of Johore [1894] 1 Q. B. 149.

[4]Leavitt *v.* Dabney (N. Y. 1868) 37 How. Pr. 264; see Smith *v.* Weguelin (1869) L. R. 8 Eq. 198.

[5]The Exchange, *supra*; The Constitution (1879) L. R. 4 P. D. 39; The Parlement Belge (1879) L. R. 5 P. D. 197; see The Charkieh (1873) L. R. 4 A. & E. 59.

[6]The Davis (1869) 77 U. S. 15; United States *v.* Wilder (U. S. C. C. 1838) 3 Sumn. 308. "In claiming exemption from the ordinary process of the court, the burden of proof is clearly upon the claimant to prove, by competent evidence, all the facts necessary to sustain this defense"—that the property has become the property of the government and is in possession of some person proved its officer. Long *v.* The Tampico (D. C. 1883) 16 Fed. 491, 500.

[7]The Johnson Lighterage Co. No. 24 (D. C. 1916) 231 Fed. 365.

gation and charge of the ship to the servants of the owner, can it be said that such a vessel is so far in the possession or control of the government that she, the ship, shall not be answerable legally for her torts or liable for other maritime liens,[8] out of courtesy to the nation which requisitioned her? This question was answered in the negative in the recent case of *The Attualita* (C. C. A. 4th Cir. No. 1479, Oct. 6, 1916.) There a privately owned trading vessel sent to this country for a cargo of cereals under requisition by the Italian government, but under the control of the employees of the owner, was libeled for damages resulting from a collision. On plea of immunity the Circuit Court of Appeals held, reversing the District Court, that a ship in these circumstances was not entitled to exemption from jurisdiction. The court seemed to be influenced largely by the fact that the persons in charge of the navigation of the ship remained the servants of the owners and that no government official was placed on board, so that the ship could not be said to have been in the actual possession of the government. The requisition being in effect the same as a charter-party, except that the owners had no volition in the matter, the action *in rem* might be maintained without disturbing the possession of the government. This decision shows the policy of the court, though there had been strong dicta to the contrary,[9] not to extend this principle of comity and create a class of vessels for which no one is responsible in any way, at a time when the practice of requisitioning merchant vessels is so common.

The Doctrine of Representation.—Courts of equity adopt as a fundamental principle the rule that all persons interested in the subject matter of a suit should be parties to it, so that there may be a decree which will end the entire controversy.[1] But it is sometimes impracticable to have present all persons interested, and the strict application of the rule in these cases would prevent a plaintiff from obtaining justice. An exception is therefore made, for the sake of convenience, where parties whose interests in the suit are merely incidental are outside the jurisdiction;[2] but, if such parties are directly concerned, the court in their absence can make no decree which will bind them.[3]

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[8]It is a fundamental principle of the law of admiralty that a collision gives to the party injured a right *in rem* in the offending ship without regard to personal responsibility, the ship itself being considered the wrongdoer, liable in an action *in rem* for the tort and subject to a lien for the damage. See The Barnstable (1900) 181 U. S. 464, 21 Sup. Ct. 684. However, where such an offending vessel was the property of a foreign sovereign and engaged in public service, it was held immune from arrest in a proceeding *in rem* for damage caused by collision. The Jassy [1906] P. 270.

[9]The Athanasios (D. C. 1915) 228 Fed. 558; The Luigi (D. C. 1916) 230 Fed. 493. In the latter case, after the requisitioned vessel had been libeled, the owners gave bond for its release, and the court held that it would retain jurisdiction of the action on the bond, as that could not affect the rights of the foreign government.

[1]Story, Equity Pleadings (10th ed.) § 72.

[2]Palmer *v.* Stevens (1868) 100 Mass. 461; Calvert, Parties, 64; Story, Equity Pleadings (10th ed.) § 78.

[3]Cassidy *v.* Shimmin (1877) 122 Mass. 406.

There is another class of cases in which a court of equity will make a decree binding the interests of those not before it, which is not properly an exception to the general rule, but proceeds on the theory that the absentees are represented in interest before the court by some one of the parties present.[4] So where the parties are very numerous and they have a common interest or right, a few may file a bill on behalf of themselves and all others similarly situated;[5] and the court may name as defendant a few individuals of a large class.[6] In the case of real property a court of equity is able to make a complete decree even if only the person entitled to the first estate of inheritance is made a party;[7] and if there be no such person, then the tenant for life.[8] With the development of the contingent remainder from a mere possibility which is easily destructible to something partaking of the nature of an estate in property,[9] there appears an interesting application of this doctrine of representation. In the recent cases of *Coquillard* v. *Coquillard* (Ind. App. 1916) 113 N. E. 474, and *Coquillard* v. *Coquillard, ibid.* 481, the testator devised to his wife for life, remainder to his two sons for life as tenants in common, with contingent remainders in fee to the unborn children of those sons. The rest and residue was given to the wife and the sons as tenants in common. There were no children *in esse*. Since the property was rapidly deteriorating in value, the sons and the wife applied to the court for the partition and sale of the property; and the question arose whether a decree for sale would bind the contingent remaindermen not *in esse*, and hence not parties to the suit. The court held that the interests of those not *in esse* were represented by the parties before the court, and a decree of sale should be made which would bind them. It was further directed that the fund received from the sale of the property should be held under the same limitations as those created by the will.

A court of equity, proceeding on the theory of representation, has an inherent jurisdiction to decree the sale of realty so as to bind the interests of contingent remaindermen;[10] and statutes generally confirm this power.[11] If the contingency lies in the happening of some event, no decree will be made unless the contingent remaindermen are before the court.[12] But if the person to take is not *in esse*, his in-

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[4]Calvert, Parties, c. 2.

[5]Dornan *v.* Buckley (1905) 119 Ill. App. 523.

[6]See Wallace *v.* Adams (1907) 204 U. S. 415, 27 Sup. Ct. 363.

[7]Dunham *v.* Doremus (1897) 55 N. J. Eq. 511, 37 Atl. 62; Calvert, Parties, 48 *et seq.*

[8]Ridley *v.* Halliday (1901) 106 Tenn. 607, 61 S. W. 1025.

[9]See Foulke, Vested & Contingent Remainders, 15 Columbia Law Rev. 680: see also 12 Columbia Law Rev. 727.

[10]Ridley *v.* Halliday, *supra;* Mayall *v.* Mayall (1896) 63 Minn. 511, 65 N. W. 942; Bedford *v.* Bedford (1912) 105 Ark. 587, 152 S. W. 129.

[11]See McClure *v.* Crume (1910) 141 Ky. 361, 132 S. W. 433; Downes *v.* Long (1894) 79 Md. 382, 29 Atl. 827. In North Carolina, the courts formerly refused to decree such a sale on the ground that the contingent remaindermen were not before the court. See *Ex Parte* Yancey (1899) 124 N. C. 151, 32 S. E. 491. But statutes passed in 1903 and 1905 gave the courts this power. See Bullock *v.* Planter's etc. Oil Co. (1914) 165 N. C. 63, 80 S. E. 972.

[12]Moseley *v.* Hankinson (1884) 22 S. C. 323.

terest will be bound by a decree,[13] provided he is represented by some one whose interests are really identical with his own.[14] The decree of sale must provide for the preservation of the interests of those entitled to take under the will by substituting the fund for the land.[15]

The *Coquillard* cases gave an excellent opportunity for the application of the doctrine of representation. The residuary clause of the will carried over to the testator's wife and two sons a vested determinable estate in fee,[16] subject to be divested on the birth of a child to either of the sons. Hence, all parties *in esse* who had any interest in the estate were before the court, and they fairly represented the interests of the remaindermen not *in esse*. In order to preserve the interests of all parties, it was necessary to decree a sale of the realty. The decree, by substituting the fund realized from the sale of the land for the land itself, followed the wish of the testator as nearly as possible. The case illustrates very well how the doctrine of representation, by doing away with the inconvenience of keeping estates tied up, works substantial justice to all concerned.

Separate Ownership of Surface of Land and Minerals Under It.—While the original owner of the fee to land owns from the clouds to the centre of the earth, he may subdivide his property in any way

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[13]Hale *v.* Hale (1893) 146 Ill. 227, 256, 33 N. E. 858; Kent *v.* Church of St. Michael (1892) 136 N. Y. 10, 32 N. E. 704; Ridley *v.* Halliday, *supra*. Since a conversion of the realty into personalty is in violation of the testator's wish, the court will not make such a decree merely for the benefit of the parties, but only where it appears necessary in order to preserve the estate from destruction. Thompson *v.* Adams (1903) 205 Ill. 552, 69 N. E. 1; Mayall *v.* Mayall, *supra*. While there seems to be no real distinction between a remainder contingent on the happening of an event and one uncertain as to the persons ultimately entitled to enjoyment, see 14 Columbia Law Rev. 66, in this case such a distinction seems necessary, for contingent remaindermen *in esse* can be brought before the court, while those *in posse*, of course, cannot.

[14]Downey *v.* Seib (1906) 185 N. Y. 427, 78 N. E. 66; Chaffin *v.* Hull (C. C. 1892) 49 Fed. 524; Smith *v.* McWhorter (1905) 123 Ga. 287, 51 S. E. 474.

[15]Monarque *v.* Monarque (1880) 80 N. Y. 320; Ruggles *v.* Tyson (1889) 104 Wis. 500, 79 N. W. 766; Bofil *v.* Fisher (S. C. 1850) 3 Rich. Eq. 1.

[16]Under the old common law, where, as in this case, A devised to B for life with contingent remainder in fee to B's unborn children, the fee was said to be in abeyance or *in nubibus*. 2 Bl. Comm. *107. But it is now generally considered that the fee remains in the grantor as a vested estate, determinable on the happening of the contingency, 4 Kent, Comm. *258 *et seq.*, and passes under a residuary clause. Egerton *v.* Massey (1857) 3 C. B. (N. S.) *338. It may be termed a quasi-reversion while retained by the grantor, but when devised in a residuary clause, it is more correctly called a determinable fee, as in Coquillard *v.* Coquillard. At any rate, whether disposed of or not by the grantor, it is a vested interest. Although in 2 Reeves, Real Property, 1140, footnote 6, and in Chaplin, Suspension of the Power of Alienation (2nd. ed.) § 308, the authors speak of a contingent reversion, citing Floyd *v.* Carow (1882) 88 N. Y. 560, the court there, in using the word "contingent", apparently means by it an estate on condition subsequent, which is of course "contingent" in one sense; it is really what has been here termed a quasi-reversion.

he chooses, by horizontal as well as by vertical planes.[1] Thus he may convey the underlying minerals separately from the surface of the land, and, in that event, the owner of the minerals and the owner of the surface are not co-tenants or joint-tenants in a common property, but owners in severalty of distinct estates.[2] The mineral estate is subject to separate taxation[3] and capable of being made the subject of ejectment.[4] Nor does the presumption that the party having possession of the surface also has possession of the subsoil exist when the rights have been thus severed.[5] This was recognized in the recent case of *Northcut* v. *Church* (Tenn. 1916) 188 S. W. 220. Plaintiffs' grantor had held adverse possession of the surface for more than the statutory period, but had conveyed the minerals to plaintiffs within the period, and the latter had never taken actual possession. The court held that plaintiffs had acquired no title, since possession of the surface by one who has conveyed to another the underlying minerals in place does not inure to the latter's benefit.

The mining rights may constitute a distinct estate in the land—a conveyance or lease—or they may be a mere incorporeal right in the land of another. Neither the form of the instrument creating the right nor the term the parties themselves have given to the transaction is necessarily decisive of this question; the instrument must be construed as a whole in order to ascertain the intent of the parties.[6] If the intent is to grant the coal itself or the right to remove the whole of it, so that nothing will be left for the reversion, there is a sale or conveyance of the coal,[7] even though the parties have called it a lease,[8] agreed on a

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[1]See Kemmerer *v.* Midland Oil & Drilling Co. (8 C. C. A. 1915) 229 Fed. 872.

[2]Virginia Coal & Iron Co. *v.* Kelly (1896) 93 Va. 332, 24 S. E. 1020; Hutchinson *v.* Kline (1901) 199 Pa. 564, 49 Atl. 312.

[3]*In re* Major (1890) 134 Ill. 19, 24 N. E. 973; Millard *v.* Delaware, Lackawanna & Western R. R. (1913) 240 Pa. 234, 87 Atl. 601.

[4]Comyn *v.* Kyneto (1606) Cro. Jac. 150; see New Jersey Zinc Co. *v.* New Jersey Franklinite Co. (1861) 13 N. J. Eq. 322, 342.

[5]See 11 Columbia Law Rev. 672. The English courts at one time had some difficulty in conceiving of a corporeal interest in an unopened mine separate from the ownership of the surface, for they regarded livery of seisin as essential to the conveyance of land, and livery could not be made of an unopened mine. Sheppard's Touchstone *96; see Caldwell *v.* Fulton (1858) 31 Pa. 475, 482; Outlaw *v.* Gray (1913) 163 N. C. 325, 79 S. E. 676. But such a separate estate in the minerals may now be created by deed, either by an exception of the surface or by a grant of the mine. See Williams *v.* South Pa. Oil Co. (1903) 52 W. Va. 181, 43 S. E. 214. In either case, the right to the minerals carries with it the right of access to them and the right to occupy so much of the surface as is reasonably necessary to the profitable and beneficial enjoyment of the property. Marvin *v.* Brewster Iron Mining Co. (1874) 55 N. Y. 538; Williams *v.* Gibson (1888) 84 Ala. 228, 4 So. 350; see Turner *v.* Reynolds (1854) 23 Pa. 199. In Chartiers Block Coal Co. *v.* Mellon (1893) 152 Pa. 286, 25 Atl. 597, it was held that the owner of the surface had a right of access through the coal he had conveyed to the underlying rock strata which he had retained. On the other hand, the mine-owner is bound to leave sufficient support for the surface. 16 Columbia Law Rev. 611.

[6]Delaware, Lackawanna & Western R. R. *v.* Sanderson (1885) 109 Pa. 583, 1 Atl. 394.

[7]Sanderson *v.* City of Scranton (1884) 105 Pa. 469.

[8]Delaware, Lackawanna & Western R. R. *v.* Sanderson, *supra*.

price to be paid by the ton as the coal is taken out,[9] or prescribed a certain period within which the mineral is to be removed.[10] In a lease also, there must be an intention on the part of the lessor to divest himself of possession and to confer it upon the lessee for the term named.[11] But one who has a mere license to mine on the land of another has no permanent interest in the land itself, but only in the proceeds as personal property, and his possession is the possession of the owner of the land.[12]

Oil and gas leases are somewhat peculiar in their form and construction because of the fact that oil and gas, unlike other minerals, do not remain fixed in place, but move about within the earth. As the oil and gas may be drawn out from under the land through the wells of an adjoining landowner, it has been said that one can have no absolute ownership of these substances without reducing them to possession.[13] All that the landowner has is the right to do what may be done on his land to reduce them to possession, and hence he cannot grant any more than this right to prospect and explore for the oil and gas.[14] On the other hand, it is argued that the possibility of the escape of these minerals ought not to render them while in place incapable of conveyance.[15] Such leases are construed so as to encourage the development of the mineral wealth of the country,[16] and, because of the danger of loss to the owner from drainage to surrounding wells, are

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[9]Hosack v. Crill (1902) 204 Pa. 97, 53 Atl. 640; Manning *v.* Frazler (1880) 96 Ill. 279.

[10]Plummer *v.* Hillside Coal & Iron Co. (1894) 160 Pa. 483, 28 Atl. 853.

[11]Paul *v.* Cragnaz (1900) 25 Nev. 293, 59 Pac. 857. One test is whether the grantee acquires an estate in the land sufficient to support an action of ejectment. Bainbridge, Mines & Minerals (5th ed.) 280.

[12]Wheeler *v.* West (1886) 71 Cal. 126, 11 Pac. 871. There is clearly nothing more than a license where the right to mine is for a limited purpose or where it does not exclude a similar right in the landowner. Gloninger *v.* Franklin Coal Co. (1867) 55 Pa. 9; Ryckman *v.* Gillis (1874) 57 N. Y. 68. The grant of a license to mine may be in the form of a quitclaim deed. Baker *v.* Clark (1900) 128 Cal. 181, 60 Pac. 677. Such a right, unlike a distinct right of property in the mines, is indivisible, because a division of the right would create new rights and prejudice the owner of the soil. Lord Mountjoy & the Earl of Huntington's Case (1583) Godb. 17; see Hughes *v.* Devlin (1863) 23 Cal. 502.

[13]Heller *v.* Dailey (1902) 28 Ind. App. 555, 63 N. E. 490.

[14]See Heller *v.* Dailey, *supra;* Federal Oil Co. *v.* Western Oil Co. (C. C. 1902) 112 Fed. 373; Frank Oil Co. *v.* Belleview Gas & Oil Co. (1911) 29 Okla. 719, 119 Pac. 260.

[15]See Texas Co. *v.* Daugherty (Tex. 1915) 176 S. W. 717; Preston *v.* White (1905) 57 W. Va. 278, 50 S. E. 236. Though a mere license is not taxable as realty, *cf.* Board of Supervisors of Hancock County *v.* Imperial Naval Stores Co. (1908) 93 Miss. 822, 47 So. 177, an oil lease is. Texas Co. *v.* Daugherty, *supra;* People *ex rel.* Carrell *v.* Bell (1908) 237 Ill. 332, 86 N. E. 593. But it seems the lessee cannot maintain ejectment. See Watford Oil & Gas Co. *v.* Shipman (1908) 233 Ill. 9, 84 N. E. 53.

[16]Parish Fork Oil Co. *v.* Bridgewater Gas Co. (1902) 51 W. Va. 583, 42 S. E. 655. This is especially true where the only consideration for the lease is the prospective royalties, for a lessee who has paid nothing should not be allowed to hold the lease merely for speculative purposes. See Huggins *v.* Daley (4 C. C. A. 1900) 99 Fed. 606.

construed more strongly against the lessee and in favor of the lessor.[17] Another example of this tendency appears in the recent case of *Pierce Fordyce Oil Ass'n.* v. *Woodrum* (Tex. Civ. App. 1916) 188 S. W. 245. The defendant, who had secured an assignment from the lessee under such an instrument, claimed that it was a conveyance, and that, as a subsequent vendee, he was not bound by the covenant to pay rent, which did not run with the land. But the court, favoring the lessor, held that the instrument was a lease, not a conveyance, and that the defendant, as assignee, was bound for the payment of the rent provided for in the original contract.

[17]Superior Oil & Gas Co. *v.* Mehlin (1910) 25 Okla. 809, 108 Pac. 545; Costigan, American Mining Law, 477.

RECENT DECISIONS.

DENTON D. ROBINSON, *Editor-in-Charge.*
EDWARD I. DEVLIN, JR., *Associate Editor.*

ADMIRALTY—JURISDICTION IN REM—VESSEL REQUISITIONED BY FOREIGN NATION.—A privately owned trading vessel sent to this country for a cargo of cereals under requisition by the Italian government, but manned entirely by employees of the owner, was arrested and an action brought *in rem* for damages resulting from a collision. Upon plea of immunity because of the requisition by a foreign state the court *held* that a ship in these circumstances was not entitled to exemption from jurisdiction. *The Attualita* (C. C. A., 4th Cir., #1479. October 6, 1916). See Notes, p. 672.

APPEAL AND ERROR—NECESSITY OF OBJECTION.—The appellate court in a criminal case, on being asked to reverse for errors to which no objection had been made, *held,* one judge dissenting, that an unjust conviction should not be affirmed because a formal objection was not made, when plain error appears in a vital matter. *Lepper* v. *United States* (C. C. A. 4th Cir. 1916) 233 Fed. 227.

Generally, in criminal as well as civil trials, appellate courts will only review questions raised in the lower courts. *Campbell* v. *People* (1884) 109 Ill. 565. Furthermore, it is required that the grounds of the objection be specified except where the error is perfectly patent, when a general objection will suffice. *Thomas* v. *Williamson* (1906) 51 Fla. 332, 40 So. 831; *Rush* v. *French* (1874) 1 Ariz. 99. 25 Pac. 816. This rule aids speedy justice by giving an opportunity for the correction of errors before the close of the trial. See *Rush* v. *French, supra.* In its application, however, difficulties arise which necessitate exceptions, especially in criminal cases, *Gonzales* v. *State* (1895) 35 Tex. Cr. 339, 33 S. W. 363; see *People* v. *Barberi* (1896) 149 N. Y. 256, 43 N. E. 635, and code provisions in the different states provide for various degrees of freedom in the review of such cases. *Edwards* v. *State* (1914) 110 Ark. 590, 163 S. W. 155; *Munroe* v. *State* (1912) 103 Miss. 759, 60 So. 773; *State* v. *Ludwig* (1913) 85 N. J. L. 18, 88 Atl. 822. In general, in civil and criminal law, questions of want of jurisdiction may be raised for the first time on appeal. *State* v. *Swikert* (1913) 65 Ore. 286, 132 Pac. 709. Again, abuse of attorney's privilege may be so flagrant as to warrant a reversal though no objection was made, see *Klink* v. *People* (1891) 16 Colo. 467, 27 Pac. 1062, while if an error is one that could not be obviated through calling attention to it, the necessity for objection disappears. *Chicago etc. R. R.* v. *Kellogg* (1898) 55 Neb. 748, 76 N. W. 462; *Freidrich* v. *Territory* (1891) 2 Wash. 358, 26 Pac. 976; see *Gawn* v. *State* (1896) 13 Oh. C. C. 116. Failure of objection should not prevent a review of a violation of a requirement mandatory upon the trial court, *Clyatt* v. *United States* (1904) 197 U. S. 207, 25 Sup. Ct. 429; *State* v. *Myers* (1894) 8 Wash. 177, 35 Pac. 580, and if the error is perfectly clear, an appellate court may correct it on its own motion. *Bank* v. *Russell* (1911) 124 Tenn. 618, 139 S. W. 734. Negligence of counsel should not waive a clear abuse of judicial discretion. The holding in the instant case and the exceptions to the general rule are all sound as effecting practical justice.

ATTORNEY AND CLIENT—REPRESENTATION OF ADVERSE INTERESTS—RIGHT TO COMPENSATION.—The plaintiff, an attorney, was employed by the defendant to obtain control of a partnership of which defendant was a member, which he did by putting the firm through bankruptcy. In the bankruptcy proceedings, plaintiff also represented the principal creditor of the firm. *Held,* three judges dissenting, plaintiff could recover compensation for services rendered defendant despite the adverse character of the interests of defendant and the creditor. *Eisemann* v. *Hazard* (1916) 218 N. Y. 155, 112 N. E. 722.

Though some courts hold that an attorney may represent adverse interests, where they may be amicably adjusted, *Lawall* v. *Groman* (1897) 180 Pa. St. 532, 37 Atl. 98, the general rule, which cannot be waived even by the express contract of the parties, *In re Boone* (C. C. 1897) 83 Fed. 944, 957; *Strong* v. *International etc. Union* (1898) 82 Ill. App. 426, is that an attorney cannot represent adverse interests even if they do not conflict. *Spinks* v. *Davis* (1856) 32 Miss. 152; *Heffron* v. *Flower* (1889) 35 Ill. App. 200. The test of adversity of interest is whether an attorney's duties to one interest will compel him to assail or neglect the other, *Strong* v. *International etc. Union, supra; Loew* v. *Gillespie* (1915) 90 Misc. 616, 153 N. Y. Supp. 830; 1 Thornton, Attorneys at Law §176, and he cannot represent adverse interests even though he unquestionably acts in good faith, *Peirce* v. *Palmer* (1910) 31 R. I. 432, 77 Atl. 201; see *Miller* v. *Lloyd* (1913) 181 Ill. App. 230, or in different litigations. *In re Boone, supra.* A judgment obtained by an attorney who violates the rule will be set aside if the injured party takes seasonable exception thereto. *Arrington* v. *Arrington* (1895) 116 N. C. 170, 21 S. E. 181; *Seaward* v. *Tasker* (Sup. Ct. 1913) 143 N. Y. Supp. 257. The representation of adverse interests in bad faith is ground for disbarment. *In re Boone, supra; In re Cowdery* (1886) 69 Cal. 32, 10 Pac. 47. Inasmuch as the object of the general rule is not only to prevent the dishonest practitioner from committing fraud, but also to preclude the honest practitioner from putting himself into a position where he may be required to choose between conflicting duties, the decision in the principal case seems erroneous.

BANKRUPTCY—STAYING OF SUITS IN STATE COURTS PENDING APPLICATION FOR A DISCHARGE.—The defendant was adjudicated a bankrupt on his voluntary petition within six years after his former discharge. *Held,* a creditor will not be restrained from proceeding with a suit in a state court though the bankrupt has not applied for a second discharge. *In re Johnson* (D. C., S. D., Ala., 1916) 233 Fed. 841.

Under § 14b of the National Bankruptcy Act of 1898 (30 Stat. 550, Comp. St. 1913 § 9598) as amended in 1903 (32 Stat. 797, Comp. St. 1913 § 9598), a bankrupt cannot be discharged from the payment of his debts if within six years previous he has been discharged in voluntary proceedings, *In re Seaholm* (1 C. C. A. 1905) 136 Fed. 144; see 14 Columbia Law Rev. 257, but that does not bar his right to be adjudicated a bankrupt a second time within that period. *In re Little* (7 C. C. A. 1905) 137 Fed. 521; 2 Remington, Bankruptcy (1st ed.) § 2579; Brandenburg, Bankruptcy (3rd ed.) § 371. Under § 21 of the Bankruptcy Act of 1867 (14 Stat. 526) suits in state courts on provable claims, whether dischargeable or not, were stayed pending the adjudication of the bankrupt's right to a discharge, *In re Rosenberg* (D. C. 1868) Fed. Cas. No. 12054; 20 Fed. Cas. 1194, but under

§ 11a of the Bankruptcy Act of 1898 (30 Stat. 549, Comp. St. 1913 § 9595), a suit in a state court will not be stayed unless it is on a dischargeable claim, *In re Lawrence* (D. C. 1908) 163 Fed. 131; *In re Dowie* (D. C. 1912) 202 Fed. 816, and the determination of the federal courts that a claim is dischargeable is conclusive and binding on the state courts. *Wagner* v. *United States* (6 C. C. A. 1900) 104 Fed. 133. Suits in state courts may be stayed by the federal courts, *In re Basch* (D. C. 1899) 97 Fed. 761, or by state courts when the fact of the pendency of the bankrupt's discharge is properly brought before them. *Hunter* v. *Lissner* (1907) 1 Ga. App. 1, 58 S. E. 54; see *Maas* v. *Kuhn* (1909) 130 App. Div. 68, 114 N. Y. Supp. 444. However, since in the principal case the creditor's suit in the state court in no way interfered with the administration of the assets in the bankruptcy court and since a discharge could not have been granted even if applied for, *In re Seaholm, supra,* the refusal of the stay seems to have been entirely proper and in consonance with the spirit and object of the Bankruptcy Act. See *In re Fed. Biscuit Co.* (2 C. C. A. 1914) 214 Fed. 221; *Cooper* v. *Troy Woolen Co.* (N. Y. 1877) 11 Abb. Pr. (n. s.) 353n.

Carriers—Liability for Baggage Forwarded Subsequently to Passenger's Transit.—The plaintiff took passage with the defendant from Raleigh, N. C., to Henderson, N. C. He delivered his valise to the defendant at Raleigh, but negligently omitted to check it through. The agent at Henderson had it forwarded at the plaintiff's request; when it arived, it had been rifled. *Held,* the plaintiff's negligence relieved the defendant of the duty of carrying the valise, and its liability is only that of a gratuitous bailee. *Perry* v. *Seaboard etc. Ry.* (N. C. 1916) 88 S. E. 156.

A common carrier of passengers is the insurer of their baggage, Elliott, Bailments §293, but this liability arises only by virtue of and incidentally to the duty to transport the passenger. 3 Hutchinson, Carriers (3rd ed.) §1241. Hence the carrier is under no duty to transport his belongings as baggage if the owner does not become a passenger, *Beers* v. *Boston etc. R. R.* (1896) 67 Conn. 417, 34 Atl. 541; *Wood* v. *Maine Cent. R. R.* (1903) 98 Me. 98, 56 Atl. 457; *Marshall* v. *Pontiac etc. R. R.* (1901) 126 Mich. 45, 85 N. W. 242, or if he presents his baggage for transportation subsequently to the completion of his trip. *Wilson* v. *Grand Trunk Ry.* (1868) 56 Me. 60. But in the principal case the carrier's agent, by subsequently undertaking to forward the plaintiff's valise as baggage, bound the company to its original duty and liability as an insurer. *Adger* v. *Blue Ridge Ry.* (1905) 71 S. C. 213, 50 S. E. 783; see *Haas* v. *Louisiana etc. Ry.* (1905) 76 Ark. 607, 89 S. W. 1001; and *cf. Isaacson* v. *New York C. etc. R. R.* (1884) 94 N. Y. 278; *Saunders* v. *Southern Ry.* (6 C. C. A. 1904) 128 Fed. 15; *Lake Shore etc. Ry.* v. *Foster* (1885) 104 Ind. 293, 4 N. E. 20. And even if the agent's act was not binding on the carrier, then the latter was no longer under any obligation to transport the valise as baggage, and hence there was an implied contract for the payment of regular freight rates. *The Elvira Harback* (C. C. 1851) Fed. Cas. No. 4424; *Graffam* v. *Boston etc. R. R.* (1877) 67 Me. 234; see *Wilson* v. *Grand Trunk Ry., supra.* Furthermore, North Carolina (Laws, Pell's Revis. 1908, c. 81, §3749) and many other jurisdictions make it unlawful for a carrier to receive a greater or less compensation from one person than from another for substantially similar services in the transportation of passengers or property;

a fortiori, free services are illegal. *State* v. *Southern Ry.* (1898) 122 N. C. 1052, 30 S. E. 133; *Matter of Boston etc. R. R.* (1891) 5 I. C. C. R. 69. In addition, §3749a of the same law makes it a criminal offense for any shipper or consignee of freight to accept such discriminatory services. Consequently, unless the plaintiff's valise was shipped as an incident of his prior contract of carriage, he is compelled to pay and the defendant to collect the regular tariff for freight, *Texas etc. Ry.* v. *Mugg* (1906) 202 U. S. 242, 26 Sup. Ct. 628; *St. Louis etc. Ry.* v. *Wolf* (1911) 100 Ark. 22, 139 S. W. 536, and hence the carrier is liable as an insurer. Although this theory has never been advanced before any court, it would seem conclusive of the principal case.

CARRIERS—LIMITATION OF LIABILITY—DURESS.—A carrier refused to ship cattle except on a written stipulation as to their condition, which, in effect, limited the carrier's liability. In a suit for damages to the cattle, *held,* the stipulation is voidable because executed under duress. *Missouri, K. & T. Ry.* v. *Pacheco* (Tex. Civ. App. 1916) 185 S. W. 1051.

In England technical duress is limited to cases of actual or threatened bodily violence, *Skeate* v. *Beale* (1840) 11 A. & E. 983; I Shep. Touchstone *61, but money paid under well grounded apprehension of great and unlawful harm to the property of the payor can be recovered in assumsit. *Hills* v. *Street* (1828) 5 Bing. 37; I Page, Contracts § 248; Keener, Quasi Contracts, 426. In the United States, due partly to a more practical view of the actual effects of such influence, and partly to the application of the broader equitable doctrine of undue influence in jurisdictions where legal and equitable actions have been united, duress of property is now generally recognized not only for recovering money paid under such pressure, but also for avoiding a contract made thereunder. *First Nat. Bank* v. *Sargent* (1902) 65 Neb. 594, 91 N. W. 595; Page, Contracts §§ 244, 248. The unjust detention of goods, causing severe hardship, constitutes such duress of property, *Harmony* v. *Bingham* (1854) 12 N. Y. 99; *Harris* v. *Cary* (1911) 112 Va. 362, 71 S. E. 551; *Spaids* v. *Barrett* (1870) 57 Ill. 289, and contracts extorted from the shipper under circumstances similar to those in the principal case are generally deemed void, *St. Louis & S. F. R. R.* v. *Wells* (1907) 81 Ark. 469, 99 S. W. 534; *cf. Jennings* v. *Smith* (1901) 106 Fed. 139, usually because the carrier and shipper do not deal with each other on equal terms and a real choice should be presented to the shipper before he shall be deemed to have voluntarily agreed to a limitation of the carrier's common law liability. *Railway* v. *Cravens* (1892) 57 Ark. 112, 20 S. W. 803; *Parker* v. *Atl. etc. R. R.* (1903) 133 N. C. 335, 45 S. E. 658; *St. Louis & S. F. R. R.* v. *Gorman* (1909) 79 Kan. 643, 100 Pac. 647. It would seem however, that the sounder ground for voiding such contracts is lack of consideration. The carrier being under a legal duty to transport goods without limitation as to liability, a further consideration, such as a lower rate, is necessary for a contract involving such limitation. *Missouri K. & T. Ry.* v. *Carter* (1895) 9 Tex. Civ. App. 677, 29 S. W. 565; *Illinois Cent. R. R.* v. *Ins. Co.* (1901) 79 Miss. 114; 30 So. 43.

CONSTITUTIONAL LAW—LABOR AS PROPERTY RIGHT—INJUNCTIONS.—The plaintiffs, members of a labor union, sought an injunction to restrain a rival labor organization from coercing the plaintiffs into joining the defendants' union by preventing them from working. Mass. Stat. 1914, c. 778 declares that no injunctions shall issue in labor cases except when necessary to prevent irreparable injury to property or

to a property right, for which there is no adequate remedy at law, and that in construing the act, the right to labor shall be considered a personal and not a property right. *Held,* this statute is unconstitutional, since it takes property without due process of law and denies the equal protection of the laws. *Bogni* v. *Perotti* (Mass. 1916) 112 N. E. 853.

That the right to labor is a property right is generally conceded. *Gray* v. *Building Trades Council* (1903) 91 Minn. 171, 97 N. W. 663; *Gillespie* v. *People* (1900) 188 Ill. 176, 58 N. E. 1007. And it is likewise settled that the legislature may not deprive any person of a property right, either directly or indirectly, without due process of law. *Forster* v. *Scott* (1893) 136 N. Y. 577, 32 N. E. 976. No man has a vested right to any particular remedy, but where the abrogation of the remedy destroys the value of the property right which the remedy purports to secure, there is in effect a deprivation of that right. See *Campbell* v. *Holt* (1885) 115 U. S. 620, 6 Sup. Ct. 209; Cooley, Constitutional Limitations (7th ed.) 515. Legislative acts impairing vested rights must be supported by valid considerations of public welfare. Whether the statute considered in the instant case constitutes a reasonable exercise of the police power is questionable. The courts have never doubted that their power to prevent by injunction irreparable injury, for which no remedy exists at law, extends to labor cases. *Allis Chalmers Co.* v. *Reliable Lodge* (1901) 111 Fed. 264; *Goldberg* v. *Stablemen's Union* (1906) 149 Cal. 429, 86 Pac. 806. That the right to labor is property of a peculiar nature and not entitled to injunctive protection, because of the grave abuses possibly arising from such proceedings, may be a valid reason for the propriety of denying the relief in equity. 13 Law Q. Rev. 347. The principal case impliedly answers this contention adversely, but as the grounds on which it bases its conclusion are not specifically stated, the case, while sound in its propositions of law, throws little real light on the constitutionality of the similar provisions of the Clayton Act.

Contracts—Impossibility of Performance—War.—The plaintiffs contracted to sell candy to the defendants for export, and deliver it within a reasonable time. On account of the war, the export of confectionery was prohibited by Proclamation; ten or fifteen days later the prohibition was removed. Meanwhile the plaintiffs had canceled the contract. In an action brought by the plaintiffs, the defendants counterclaimed for breach of contract. *Held,* the mere delay was insufficient to permit the plaintiffs to cancel the contract. *Millar & Co.* v. *Taylor & Co.* (Ct. of App.) [1916] 1 K. B. 402.

The defendants contracted to supply the plaintiffs with goods imported from Germany, the defendants having a right to cancel for "contingencies beyond your (their) control". The war made importation from Germany impossible. *Held,* defendants may cancel. *Thaddeus Davids Co.* v. *Hoffman-La Roche Chemical Works* (Sup. Ct., App. Term, 1st Dept., 1916) 160 N. Y. Supp. 973.

The defendants contracted to send a ship to Mariopol and load a cargo for the plaintiffs, "restraints of princes" excepted. Erroneously thinking that the voyage was already illegal, the defendants failed to perform, and claimed on the trial that a reasonable belief that the expected outbreak of war would render such voyage illegal served to excuse them. *Held,* they are not excused. *Mitsui & Co.* v. *Watts, Watts & Co.* (*Ct. of App.* 1916) 115 L. T. R. 248. See Notes, p. 668.

CORPORATIONS—ALIEN ENEMY SHAREHOLDERS—WARTIME STATUS OF THE CORPORATION.—All but one of the shares of a company incorporated in England were owned by German subjects and a German corporation. *Semble,* after the outbreak of the war, such a corporation should be considered as an enemy. *Daimler Co. Ltd.* v. *Continental Tyre and Rubber Co. (Great Britain) Ltd.* [1916] 2 A. C. 307.

An alien enemy, in the absence of license, express or implied, see 16 Columbia Law Rev. 525, cannot sue in the local courts, *Sanderson* v. *Morgan* (1868) 39 N. Y. 231; *Perkins* v. *Rogers* (1871) 35 Ind. 124, and a corporation and an individual stand on the same basis in the eyes of the law. *The Society etc.* v. *Wheeler* (1814) 2 Gall. (U. S. Cir. Ct.) 104. The right to sue, however, revives after peace. *Hanger* v. *Abbott* (1867) 73 U. S. 532. In the United States, a corporation is conclusively presumed to be a citizen of the state which incorporated it for the purpose of giving jurisdiction to the federal courts, *Louisville C. & C. R. R.* v. *Letson* (1844) 43 U. S. 497, but the presumption will not be extended. *St. Louis etc. Ry.* v. *James* (1896) 161 U. S. 545, 16 Sup. Ct. 621. Furthermore, the recent tendency of the courts is decidedly in favor of disregarding the fiction of the corporate entity when the exigency of the case, *Donovan* v. *Purtell* (1905) 216 Ill. 629, 75 N. E. 334, or public policy, *State* v. *Standard Oil Co.* (1892) 49 Oh. St. 137, 30 N. E. 279, requires it. The courts are at variance on the question presented by the principal case. Some decisions regard the nationality of the corporation as that of the country which created it, *Amorduct Mfg. Co.* v. *Defries & Co.* (1914) 31 T. L. R. 69; *Janson* v. *Driefontein Consol. Mines Ltd.* [1902] A. C. 484, while others look back of the corporate entity to the nationality of the stockholders to determine whether or not the corporation must be deemed an alien enemy. See *Society etc.* v. *Wheeler, supra*; *The Tommi* [1914] P. 251, 31 T. L. R. 15. The doctrine of the principal case, in following the latter view, would seem to be in harmony with both the recent tendency of the courts and a sound public policy.

CRIMINAL LAW—INDICTMENT—ALTERNATIVE CHARGES—ELECTION.—Plaintiff in error had been on trial under an indictment charging alternatively in one count that he "sold, offered for sale, kept for sale or otherwise disposed of liquors". Being convicted of "keeping for sale", he contends it was reversible error that the court below allowed the state, over his objection, to introduce evidence of a second liquor sale by him, after proving a first sale by which he claims it made an election to prosecute for that offense of selling alone. *Held,* the state made no such election by the mere introduction of evidence sustaining one or more of the alternative charges, though the defendant might have compelled an election. *Barefield* v. *State* (Ala. App. 1916) 72 So. 293.

At common law an indictment charging two or more distinct offenses in the same court is bad for duplicity. *John Gund Brewing Co.* v. *United States* (8 C. C. A. 1913) 204 Fed. 17; *Commonwealth* v. *Grube* (1910) 20 Pa. Dist. 212. But occasionally it is provided by statute that offenses may be joined in one count, Mo. Rev. Stat. 1909 § 4528, or, as in the statute of the principal case, alternatively therein; Ala. Cr. Code 1907 § 7151; but under the latter type of statute, only one conviction may be had under a count. *Warrick* v. *State* (1913) 8 Ala. App. 391, 62 So. 342. Where an indictment count charges a single offense, some authorities hold that if the state introduces evidence of a specific act, it will constitute an election, and the prosecu-

tion cannot thereafter prove any other act of the kind as a substantial offense on which a conviction may be had. *Moore* v. *State* (1914) 10 Ala. App. 179, 64 So. 520; *State* v. *Hansen* (1912) 40 Utah 418, 122 Pac. 375, while other authorities in such a case admit evidence by the state of more than one act, *State* v. *Stephens* (1897) 70 Mo. App. 554; *Golden* v. *State* (1913) 72 Tex. Cr. 19, 160 S. W. 957, a majority of these then giving the defendant a right to compel an election. *Commonwealth* v. *Coyne* (1910) 207 Mass. 21, 92 N. E. 1028; *Golden* v. *State, supra*; *contra, State* v. *Heinze* (1891) 45 Mo. App. 403. But where by statute, one count contains alternative charges, evidence of more than one act is admissible, the mere proving of a single act not constituting an election. *Moss* v. *State* (1912) 3 Ala. App. 189, 58 So. 62. As the primary purpose of such a statute is to strike down technicalities employed to escape punishment, it seems that this rule, adopted by the principal case, is correct. But the state, after having developed all its evidence, may be compelled to elect between the charges. *Warrick* v. *State, supra*; *Moss* v. *State, supra.*

DIVORCE—ALIMONY—CONSTRUCTIVE SERVICE—PROCEEDING IN REM.—Where petitioner in a suit for divorce asked that alimony be charged against the domestic lands of her husband, described in the petition, and constructive service only was had upon the defendant, *held,* the trial court had jurisdiction to give the relief demanded. *Chapman* v. *Chapman* (Mo. App. 1916) 185 S. W. 221.

In divorce proceedings, the action is generally considered to be *in rem* as to the marital status; *Harding* v. *Allen* (1832) 9 Me. 140; *in personam* as to alimony and costs. *Prosser* v. *Warner* (1875) 47 Vt. 667; *Proctor* v. *Proctor* (1905) 215 Ill. 275, 74 N. E. 145. But where specific property has been brought under the control of the court, whether by attachment, receivership or otherwise the action is *in rem* against the property and no actual service upon the defendant is necessary. *Murray* v. *Murray* (1896) 115 Cal. 266, 47 Pac. 37; *cf. Smith* v. *Smith* (1901) 74 Vt. 20, 51 Atl. 1060. Some jurisdictions consider the alimony as one of the incidents of the marital status, and while admitting that no personal judgment can be obtained upon constructive service, hold that any property of the defendant within the territorial jurisdiction of the court may, by the decree, be charged with the alimony, especially where such property has been described in the petition. *Twing* v. *O'Meara* (1882) 59 Iowa 326, 13 N. W. 321; *Wesner* v. *O'Brien* (1896) 56 Kan. 724, 44 Pac. 1090. The marital status is the relation of the parties to each other and to the community and cannot properly include the property rights of either party which, as in the principal case, exist independently of the marriage relation. *Cf. Garner* v. *Garner* (1880) 56 Md. 127; *Ditson* v. *Ditson* (1856) 4 R. I. 87; *Doerr* v. *Forsythe Adm'x.* (1893) 50 Oh. St. 726, 35 N. E. 1055; 2 Bishop, Marriage, Divorce & Separation § 83. To render judgment *in rem,* the *res* must be before the court, *Cooper* v. *Reynolds* (1870) 77 U. S. 308. Since the lands of the defendant have not been brought under the control of the court as a distinct *res,* and since they cannot properly be included within the marital status, the doctrine of the instant case would seem to depart from sound principles, without securing additional rights to the aggrieved party.

EMPLOYERS' LIABILITY ACT—DAMAGES—PECUNIARY ASSISTANCE.—The father, as administrator, brought an action under the Federal Em-

ployers' Liability Act to recover damages for his adult son's death. The evidence was conflicting as to whether the son ever contributed to the father's support. *Held,* it is not necessary to prove that a decedent has made actual contribution to the support of his parents in order to establish a reasonable expectation of pecuniary benefit from the continuance of his life. *Pittsburg, C., C. & St. L. Ry.* v. *Collard's Adm'r.* (Ky. 1916) 185 S. W. 1108.

American statutes providing for a recovery for death by a wrongful act are modeled on the English Act of 1846, known as Lord Campbell's Act. Under this act substantial damages may be recovered where a reasonable expectation of pecuniary assistance is established. *Franklin* v. *Southeastern Ry.* (1858) 3 Hurl. & N. 211; *Taff Vale Ry.* v. *Jenkins* [1913] A. C. 1. Under similar laws enacted by the states the courts have limited recovery to the pecuniary loss of the plaintiff, but have held a reasonable expectation of pecuniary advantage sufficient to ground a recovery of substantial damages. *Hopper* v. *Denver etc. R. R.* (8 C. C. A. 1907) 155 Fed. 273; *Swift & Co.* v. *Johnson* (8 C. C. A. 1905) 138 Fed. 867. Recent decisions under the Federal Act have allowed a similar recovery. *Dooley* v. *Seaboard etc. Ry.* (1913) 163 N. C. 454, 79 S. E. 970; *Michigan Cent. R. R.* v. *Vreeland* (1913) 227 U. S. 59, 33 Sup. Ct. 192. A pecuniary loss, however, must be clearly established by the beneficiary, or the recovery will be limited to nominal damages. *Garritt* v. *Louisville & N. R. R.* (6 C. C. A. 1912) 197 Fed. 715; *Fordyce* v. *McCants* (1889) 51 Ark. 509, 11 S. W. 694. No damages may be recovered for the loss of society, or for grief, sorrow or injury to feelings. *Michigan Cent. R. R.* v. *Vreeland, supra.* The theory of these acts is not to punish the defendant for negligent destruction of life, but to give the beneficiary what he would probably have received had the deceased lived. *A. T. & S. F. R. R.* v. *Brown* (1881) 26 Kan. 443. It would seem needlessly harsh to limit a parent's recovery to the amount actually contributed by their son to their support, or to allow only nominal damages where no actual assistance was rendered but a reasonable expectation of such assistance was well established.

Evidence—Criminal Law—Conduct of Judge at Trial.—The defendant pleaded not guilty to an indictment for counterfeiting. The court asked the accused whether he had written or procured others to write to the court admitting the accused's guilt and requesting a suspended sentence. The defendant admitted the letters. *Held,* one judge dissenting, the court's interrogation was error but, in view of the overwhelming evidence against the defendant, was not prejudicial and therefore not ground for a reversal. *Lepper* v. *United States* (C. C. A. 4th Cir. 1916) 223 Fed. 227.

The question of the limitations on the rights and powers of a judge during trial is beset with difficulties. A judge may not be a witness in a case over which he presides. See *People* v. *Dohring* (1874) 59 N. Y. 374; *Rogers* v. *State* (1894) 60 Ark. 76, 29 S. W. 849. That he has the right in the interests of truth and justice to interrogate witnesses is generally admitted, *Adler* v. *United States* (5 C. C. A. 1910) 182 Fed. 464; *Epps* v. *Georgia* (1855) 19 Ga. 102, although some courts particularly urge the necessity of extreme caution in the exercise of this right. *Leo* v. *State* (1902) 63 Neb. 723, 89 N. W. 303; *Dunn* v. *People* (1898) 172 Ill. 582; 50 N. E. 137. It has been held that the court should neither interrogate in regard to a subject as yet

untouched, *State* v. *Gauthreaux* (1913) 134 La. 690, 64 So. 680, nor by its questions assume the role of an impeaching witness. *Smith* v. *Commonwealth* (1913) 154 Ky. 613, 157 S. W. 1089. Certainly it is extremely important that the court avoid partiality in putting its questions. *Murphy* v. *State* (1913) 13 Ga. App. 431, 79 S. E. 228; *Leo* v. *State, supra.* Although the weight of authority does not restrict the court to the same rules of evidence as bind counsel in regard to leading questions, *Epps* v. *Georgia, supra*; *Commonwealth* v. *Galavan* (1864) 91 Mass. 271, it is difficult to support this on sound reasoning. *State* v. *Crotts* (1900) 22 Wash. 245, 60 Pac. 403. The entire question resolves itself into determining whether a trial court has abused its discretionary powers, and appellate courts are loath to reverse unless the abuse has been clear. See *Adler* v. *United States, supra.* The appellate court would seem clearly to have been correct in declaring that the questioning in the instant case was erroneous, but is to be commended for refusing to reverse, since such refusal followed the sound modern doctrine that an error must be prejudicial to be ground for reversal. *State* v. *Crawford* (1905) 96 Minn. 95, 104 N. W. 822.

Evidence—Criminal Law—Confessions—Joint Defendants.—In a trial for arson, the involuntary confession of one defendant implicating the other joint defendant, the present appellant, was admitted to impeach the confessor, and the court charged the jury to disregard it in considering the guilt of the appellant. *Held,* even assuming the confession was admissible as against the confessor, it is prejudicial to the appellant notwithstanding the court's charge, and its admission is therefore reversable error. *People* v. *Buckminster* (Ill. 1916) 113 N. E. 713.

A confession freely made and clearly proven is of the highest value as evidence against the confessor. 1 Wigmore, Evidence § 866; 1 Greenleaf, Evidence (16th ed.) §§ 214, 215; see *Commonwealth* v. *Killion* (1907) 194 Mass. 153, 80 N. E. 222. Being of legitimate probative value such confession is *prima facie* admissible. See 1 Wigmore, Evidence § 10. It is well settled, however, that no declaration of one conspirator made after the crime is committed can be used as evidence against his co-conspirators. *State* v. *Nist* (1911) 66 Wash. 55, 118 Pac. 920; *People* v. *McQuade* (1888) 110 N. Y. 284, 307, 18 N. E. 156. The fact that it would unjustly prejudice the joint defendant would be good ground for excluding it, but this reason fails if there is any other way of conserving the defendant's interests. See 3 Wigmore, Evidence § 1863. The usual method of protecting the joint defendant is to charge the jury to disregard the confession as affecting the guilt of the joint defendant. *Rex* v. *Martin* (1905) 9 Ont. L. R. 218; 2 Br. R. C. 336; *State* v. *Rinehart* (1890) 106 N. C. 787, 11 S. E. 512; *People* v. *Arnold* (1881) 46 Mich. 268, 9 N. W. 406. Obviously, the jury may nevertheless be affected by such evidence, and it would seem that a better remedy is a severance of the trials, as by this means the confession is admitted against the confessor without being before the jury in the case of his co-defendant. *Commonwealth* v. *James* (1866) 99 Mass. 438; Wharton, Criminal Pl. & Pr. (9th ed.) § 310; see *Rex* v. *Martin, supra*; *cf. Davis* v. *People* (1895) 22 Colo. 1, 43 Pac. 122. In general whether such a severance shall be granted upon the defendant's motion is discretionary with the court. Wharton, Criminal Pl. & Pr. (9th ed.) § 309; *United States* v. *Marchant* (1827) 25 U. S. 480; *Emery* v. *State* (1899) 101 Wis. 627, 78 N. W. 145.

HUSBAND AND WIFE—SEPARATE AGREEMENT AS BAR TO SUIT FOR JUDICIAL SEPARATION.—To a suit for judicial separation, instituted by the wife, the husband pleaded in bar a separation agreement, made after the parties had separated. *Held,* though the provisions for separate maintenance are enforcible in such an agreement, it cannot bar a suit for judicial separation. *Landes* v. *Landes* (1916) 94 Misc. 486, 159 N. Y. Supp. 586, aff'd on different grounds, 172 App. Div. 758, 159 N. Y. Supp. 230. See Notes, p. 670.

HUSBAND AND WIFE—SURETYSHIP—MORTGAGE OF WIFE'S SEPARATE ESTATE.—The plaintiff's wife conveyed to him her separate estate and then joined him in a mortgage thereof to secure his debt to the defendant who had knowledge of the original ownership of the wife. In a suit to cancel the said mortgage it was *held* that the transaction as a whole amounted to security by the wife for the debt of the husband, and is void under Alabama Code 1907 § 4497. *Vinegar Bend Lumber Co.* v. *Leftwich* (Ala. 1916) 72 So. 538.

Under enabling statutes abrogating the common law rule of identity, a few states find no difficulty in allowing a wife to secure her husband's debt out of her separate estate, *Goldsmith* v. *Lewine* (1902) 70 Ark. 516, 69 S. W. 308; 1 Brandt, Suretyship & Guaranty (3rd ed.) § 9, but in many states are found express statutes similar to that in the principal case prohibiting a married woman from entering into, or binding her estate by, any contract of suretyship. 1 Brandt, *op. cit.* § 10; *Richardson* v. *Stephens* (1899) 122 Ala. 301, 25 So 39; *Webb* v. *John Hancock Ins. Co.* (1904) 162 Ind. 616, 69 N. E. 1006. The theory of the latter legislation is that the law, while it has removed her disability with regard to ownership and disposition of property, should nevertheless protect the interests of the *feme covert* from being wasted and impaired by assumption, through undue family influence, of debts for the benefit of other persons. See *Richardson* v. *Stephens, supra*; *Third Nat. Bank* v. *Tierney* (1908) 128 Ky. 836, 110 S. W. 293. Accordingly, her suretyship is determined not from the form of the contract, but from ascertaining whether she has received in person or property the benefit of the consideration, *Field* v. *Campbell* (1904) 164 Ind. 389, 393, 72 N. E. 260; *Williams* v. *Hugunin* (1873) 69 Ill. 214, 220; Schouler, Domestic Relations (5th ed.) § 146, and though an estoppel in favor of an innocent third party might in some states under statutory provision forfeit a wife's protection, *Indianapolis Brewing Co.* v. *Behnke* (1907) 41 Ind. App. 288, 81 N. E. 119, and in others even without express provision, *Osborne* v. *Cooper* (1896) 113 Ala. 405, 21 So. 320, yet in general courts have shown themselves astute in examining into the real purpose of transactions tending to evade the statute. *Third Nat. Bank* v. *Tierney, supra*; *Webb* v. *John Hancock Ins. Co., supra.* The instant case, therefore, arising under a statute expressly prohibiting suretyship, seems clearly justified as much in its interpretation of the facts as in its declaration of the law.

INSURANCE—DISAPPEARANCE CLAUSE—VALIDITY.—A certificate holder in a benevolent society agreed that all existing and subsequently passed by-laws should form part of his certificate. A subsequently passed by-law provided that a member's disappearance should not be evidence of death nor create a right to recover until the expiration of the term of his life expectancy. *Held,* the by-law is void as contravening the

statutory presumption of death. *Sovereign Camp of Woodmen of the World* v. *Robinson* (Tex. Civ. App. 1916) 187 S. W. 215.

Generally, contractual stipulations as to the admission or effect of evidence are not favored by the courts. By-laws similar to the one in the instant case are held void since they contravene a statute, *National Union* v. *Sawyer* (1914) 42 D. C. 475, or because they are unreasonable, *Samberg* v. *Knights etc.* (1909) 158 Mich. 568, 123 N. W. 25, or because they tend to impede the court or deprive it of jurisdiction. *Supreme Ruling etc.* v. *Hoskins* (Tex. Civ. App. 1914) 171 S. W. 812; *contra, Kelly* v. *Supreme Council etc.* (1899) 46 App. Div. 79, 61 N. Y. Supp. 394. Yet under other circumstances, courts have allowed companies to stipulate as to the evidence necessary to prove liability. *Moses* v. *Illinois etc. Ass'n.* (1914) 189 Ill. App. 440; *Roeh* v. *Business Men's etc.* (1914) 164 Iowa 199, 145 N. W. 479; *contra, Utter* v. *Travellers' Ins. Co.* (1887) 65 Mich. 545, 32 N. W. 812. It seems difficult when one remembers the character of benevolent societies and the distinction between their purpose and that of insurance companies organized for profit, to understand wherein it is against public policy for such benevolent societies to stipulate that proof of actual death be necessary to create a liability. *Hall* v. *Western Travelers etc.* (1903) 69 Neb. 601, 96 N. W. 170; *McGovern* v. *Brotherhood etc.* (1909) 31 Ch. Cir. Ct. 243. It would seem rather that such contracts, like those waiving the Statute of Limitations, should be held valid as falling within that class of agreements which waive statutes designed wholly for the benefit of the individual. Morever, such a by-law is not invalid as divesting the insured of vested rights. No person has a vested right in the rules of evidence, Cooley, Constitutional Limitations (7th ed.) 524, and the distinction between a by-law abrogating a rule of evidence, and one which by means of such abrogation excepts a risk assumed, see *Supreme Ruling etc.* v. *Hoskins, supra,* would seem insupportable. For it could scarcely be maintained that a right to recover after a disappearance was one of the risks assumed within the concept of the contract as made by the parties.

Insurance—Fidelity Bonds—Renewals as Separate Contracts.—A fidelity bond executed by the defendant indemnified the plaintiff for the period of one year against pecuniary loss sustained through the dishonest acts of its cashier amounting to embezzlement or larceny. After renewal of the bond in its original terms for six successive years by means of continuance certificates, another bond was executed in which the premium was reduced and the scope of liability broadened to include general acts of dishonesty. In a suit to recover for defalcations prior to the execution of the new bond it was *held* that such new bond, considering the changes made, was a separate and distinct contract and not a continuance of the original. *Miners & Merchants Bank* v. *United States Fidelity & Guaranty Co.* (C. C. A. 9th Cir. 1916) 233 Fed. 654.

By the weight of American authority fidelity bonds are regarded as a form of insurance, Richards, Insurance (3rd ed.) § 469; *People* v. *Rose* (1898) 174 Ill. 310, 51 N. E. 246; see *Champion Ice etc. Co.* v. *American Bonding etc. Co.* (1903) 115 Ky. 863, 75 S. W. 197, and are subject to the general rules of interpreation applicable to contracts of insurance. *U. S. Fidelity etc. Co.* v. *First Nat. Bank* (1908) 233 Ill. 475, 84 N. E. 670; *Remington* v. *Fidelity etc.* (1902) 27 Wash. 429, 67 Pac. 989. Renewals of fidelity bonds have been declared by a number of jurisdictions to be separate and distinct contracts, *Alexander Camp-*

bell Milk Co. v. *U. S. Fidelity etc. Co.* (1914) 161 App. Div. 738, 146 N. Y. Supp. 92; *DeJernette* v. *Fidelity etc. Co.* (1896) 98 Ky. 558, 33 S. W. 828; *Green* v. *U. S. Fidelity etc. Co.* (Tenn. 1916) 185 S. W. 726, and this holding logically follows from the conception of successive contracts of insurance as a series of unilateral contracts, each renewal based on its own consideration. *Brady* v. *Northwestern Ins. Co.* (1863) 11 Mich. 425; see *Alexander Campbell Milk Co.* v. *U. S. Fidelity etc. Co., supra.* The court in the instant case bases its decision on a radical change in the terms and consideration in the new bond and clearly is justified in declaring it a separate and distinct contract even where a renewal might ordinarily be regarded as a continuance of the original bond.

INSURANCE—FORFEITURE—CHANGE OF INTEREST—SALE BY TENANT IN COMMON.—Plaintiff and one Blocker were tenants in common of two buildings, and one insurance policy on the same was issued to both, which provided that "if any change takes place in the interest, title, or possession of the subject of insurance, the entire policy shall be void". Blocker sold his interest to a third party, and the building subsequently was burned. *Held,* two judges dissenting, the policy was void only as to one-half the insurance and the plaintiff can recover the other half. *Firemen's Ins. Co.* v. *Larey* (Ark. 1916) 188 S. W. 7.

The clause against alienation is inserted in insurance policies in order to prevent any change in the moral hazard assumed by the company as to the personal character and integrity of the insured. *Malley* v. *Atlantic Ins. Co.* (1883) 51 Conn. 222, 251; *Germania Fire Ins. Co.* v. *Rome Ins. Co.* (1894) 144 N. Y. 195, 39 N. E. 77; Richards, Insurance (3rd ed.) §§ 60, 263. Accordingly, where a new partner is introduced into the personnel of a firm the entire policy is void, because a new moral risk has been imposed upon the insurer; *Germania Fire Ins. Co.* v. *Home Ins. Co., supra*; *Malley* v. *Atlantic Ins. Co., supra*; Richards, Insurance (3rd ed.) § 263; but where the change of interest occurs between existing partners, the moral hazard has not been affected and the policy is still enforceable. *Hoffman* v. *Aetna Fire Ins. Co.* (1865) 32 N. Y. 405; Richards, Insurance (3rd ed.) § 266. Contracts of insurance have been held by the majority of courts to be divisible where there are several items insured at different amounts, so that a contract, void as to some items, will not be void as to all. *Trabue* v. *Dwelling House Ins. Co.* (1893) 121 Mo. 75, 25 S. W. 848; *Hartford Fire Ins. Co.* v. *Walsh* (1870) 54 Ill. 164; *contra, Thomas* v. *Commercial Union Ass. Co.* (1894) 162 Mass. 29, 37 N. E. 672. But these cases of different items of insurance are not applicable to the principal case where the question involved was the divisiblity of a policy between the parties insured. The policy was given to the two insured jointly and not as a policy to each one to cover the undivided interest of each, and hence it seems that if void as to one party, it will be void as to both. Since an alienation by a tenant in common brings a stranger into control of the whole property, 2 Reeves, Real Property § 686, it would seem that the court erred in not applying the rule as to increased moral hazard, so as to render the policy void as to both tenants.

INTERSTATE COMMERCE—APPLICATION OF STATE LAW TO TRANSPORTATION OF PERSONS TO WHOM THE HEPBURN ACT DOES NOT APPLY.—The plaintiff, a news agent on defendant's train by virtue of a contract made in

Texas between his employers and the defendant company and exempting the defendant from liability for any injury to the plaintiff, was injured while on an interstate trip. If the plaintiff was a passenger the contract of exemption was void as against public policy and he could recover. If he was not a passenger the contract would be a good defense to his action. *Held,* whether the relation of passenger existed is governed by federal law and not by state law, as the contract contemplated interstate transportation. *Nevill* v. *Gulf etc. Ry.* (Tex. Civ. App. 1916) 187 S. W. 388.

Though it is settled law that where Congress has passed legislation upon a matter of interstate commerce such law is supreme, it is equally clear that until Congress does act the states may do so. *Minnesota Rate Cases* (1912) 230 U. S. 352, 33 Sup. Ct. 729; *Adams Express Co.* v. *Croninger* (1912) 226 U. S. 491, 33 Sup. Ct. 148. This is probably subject to the limitation that the state law shall be within the scope of its police power and shall not appreciably hamper interstate commerce. *Smith* v. *Alabama* (1888) 124 U. S. 465, 8 Sup. Ct. 564; *Gladson* v. *Minnesota* (1897) 166 U. S. 427, 17 Sup. Ct. 627. Before Congress forbade any limitation of the liability of an interstate carrier for negligence, 34 Stat. c. 3591, § 7, p. 595, this point was governed by state law, and it is immaterial whether such law is expressed by statute or by decisions of the state courts. *Pennsylvania R. R.* v. *Hughes* (1903) 191 U. S. 477, 24 Sup. Ct. 132; see *Adams Express Co.* v. *Croninger, supra.* The Hepburn Act expressly excepts certain persons from its regulations, including among others news agents, railway postal clerks, and caretakers of live stock. 34 Stat. 584 c. 3591, § 1. Whether a railway postal clerk or a drover is a passenger, and the liability of the carrier for injuries to such clerk or drover, is a question of state law, not of federal law. *Martin* v. *Pittsburg etc. Ry.* (1906) 203 U. S. 284, 27 Sup. Ct. 100; *Southern Pac. Ry.* v. *Schuyler* (1912) 227 U. S. 601, 33 Sup. Ct. 277; *Wiley* v. *Grand Trunk Ry.* (D. C. 1915) 227 Fed. 127. No federal law has defined the status of a news agent on an interstate train, and it would therefore seem to follow that whether the relation of passenger and carrier exists in the principal case and the plaintiff's right to safe carriage as dependent thereon are matters of state law, not of federal law. *Cf. Southern Pac. Ry.* v. *Schuyler, supra*; *Wiley* v. *Grand Trunk Ry., supra.*

JUDGMENTS—OPENING DEFAULT JUDGMENT—STATEMENT BY ADVERSE ATTORNEY.—In an equity suit to reopen a default judgment, the petitioner alleged that he held a release of the plaintiff's claim, but had failed to plead the same or defend the suit because the plaintiff's attorneys had told him that the case would go no further. *Held,* the judgment should be reopened. *Keller* v. *Young* (Tex. Civ. App. 1916) 186 S. W. 405.

A party is not entitled to invoke the aid of equity against a common law judgment when he has an adequate remedy at law, *Dale* v. *Bland* (1910) 93 Ark. 266, 124 S. W. 1026; *Missouri K. & E. Ry.* v. *Hoereth* (1898) 144 Mo. 136, 45 S. W. 1085, or when, having had such a remedy, he neglected to take advantage of it within the time allowed. *Christy* v. *Atchison etc. Ry.* (D. C. 1914) 214 Fed. 1016; *Weed* v. *Hunt* (1908) 81 Vt. 302, 70 Atl. 564. A default judgment will not be opened by equity unless the petitioner can show both a meritorious defense and a loss of that defense either because it was not available to him at law or because he was prevented from setting it up by the fraud or act

of the prevailing party or by a mistake or accident on his own side, unmixed with any fault or negligence on his part. *Peacock* v. *Feaster* (1906) 52 Fla. 565, 42 So. 889; *Valley City Desk Co.* v. *Travelers' Ins. Co.* (1906) 143 Mich. 468, 106 N. W. 1125; *Henley* v. *Chabert* (1914) 189 Ala. 258, 65 So. 993. But a defendant against whom a default is obtained in violation of a compromise agreement on which he relied in not appearing, is not negligent, and equity will enjoin the enforcement of such a judgment as fraudulent. *Gates* v. *Steele* (1890) 58 Conn. 316, 20 Atl. 474; *McGregor* v. *Shaw* (1858) 11 Cal. *47. Furthermore, the defendant's reliance on a statement of the opposite party or attorney that the proceedings are not to continue, is an excuse for a relaxation of diligence on his part, *Beverley* v. *Flesenthall Bros.* (1914) 142 Ga. 834, 83 S. E. 942; *Stodgell* v. *Garnett* (1910) 159 Ill. App. 301, and he need only show, in case the statement is by an adverse attorney, that such attorney had apparent authority to make it. *Texas & P. Ry.* v. *Miller* (Tex. Civ. App. 1914) 171 S. W. 1069. It seems, therefore, that the petitioner in the principal case was entitled to the relief granted.

Mines and Minerals—Adverse Possession—Possession of Surface.—The Plaintiff's grantor had held adverse possession of the surface for more than the statutory period, but had conveyed the minerals to the plaintiffs within the period, and the plaintiffs had never taken actual possession. *Held,* the plaintiffs had acquired no title, since possession of the surface by one who has conveyed to another the underlying minerals in place does not inure to the latter's benefit, as it is not a possession of the severed mineral interest. *Northcut* v. *Church* (Tenn. 1916) 188 S. W. 220. See Notes, p. 676.

Mines and Minerals—Oil and Gas Leases—Liability of Assignee.—The Defendant, who had secured an assignment from the lessee under an oil and gas lease made by the plaintiff, claimed that the instrument was a conveyance of the oil and gas and that, as a subsequent vendee, he was not bound by the covenant to pay rent, which did not run with the land. *Held,* the instrument was a lease, not a conveyance, and the defendant, as assignee, was bound for the payment of the rent provided for in the original contract. *Pierce Fordyce Oil Ass'n.* v. *Woodrum* (Tex. Civ. App. 1916) 188 S. W. 245. See Notes, p. 676.

Partnership—Fraud—Burden of Proof.—The defendant, who had sole charge of the partnership, bought the plaintiff's interest. Although the latter had access to a clear set of books, he bought without examining them. *Held,* one judge dissenting, the burden of proof is on the plaintiff to show fraud in the sale. *Aronhime* v. *Levinson* (Va. 1916) 89 S. E. 693.

The general rule is that a person who alleges fraud has the burden of proving it. Kerr, Fraud & Mistake (3rd ed.) 414. In equity, however, relations of trust and confidence are so highly regarded that the burden of proving the honesty of a transaction is transferred to the defendant "who bargains in matter of advantage with a person placing confidence in him". *Gibson* v. *Jeyes* (1801) 6 Ves. *266, *278. It is the presence of confidential relations which creates this extraordinary burden, 1 Story, Equity Juris. (12th ed.) § 311, hence it arises even when the confidence is merely a personal one. 2 Pomeroy, Equity Juris. (3rd ed.) § 956. Thus attorneys are bound to this unusual responsibility,

Denton v. *Donner* (1856) 23 Beav. 285; *Roby* v. *Colehour* (1890) 135 Ill. 300, 25 N. E. 777, as well as trustees. *Coles* v. *Trecothick* (1804) 9 Ves. *234; *Smith* v. *Howlett* (1898) 29 App. Div. 182, 51 N. Y. Supp. 910. Since the relations between partners are fiduciary, *Yost* v. *Critcher* (1911) 112 Va. 870, 72 S. E. 594; *Roby* v. *Colehour, supra*; see *Goldsmith* v. *Eichold* (1891) 94 Ala. 116, 10 So. 80, when one partner, familiar with the partnership affairs, buys the interest of another who has not had the opportunity to become so well informed, the former must prove the honesty and fairness of the transaction. *Brooks* v. *Martin* (1863) 69 U. S. 70; *Platt* v. *Platt* (N. Y. 1873) 2 Thomp & C. 25, 40; *Gilbert* v. *Anderson* (1907) 73 N. J. Eq. 243, 66 Atl. 926. Where, however, both partners had equal opportunity to inform themselves, the weight of authority is with the majority holding of the principal case in putting the burden of proof on the plaintiff who alleges fraud. *Murray* v. *Elston* (1873) 24 N. J. Eq. 310, aff'd (1874) 24 N. J. Eq. 589; *Dorsett* v. *Ormiston* (1898) 25 Misc. 570, 55 N. Y. Supp. 1037. But since even in an ordinary fraud the fact that the plaintiff had access to information does not affect his right to relief, Kerr, Fraud & Mistake (3rd ed.) 415, and since the fiduciary relations between the parties tend further to disarm suspicion, the minority opinion seems preferable, both on principle and because of the modern demand for a high standard of commercial integrity.

Public Service Corporations—Authority of Court in Reviewing Determination of Commission.—N. Y. Consol. Laws (1910) c. 48 § 66 gives the Public Service Commission authority to order gas companies to make such reasonable improvements and extensions as will best promote public interest. Under this statute, the Commission ordered an extension of gas pipes to an outlying district of the city. *Held,* the lower court had no power to annul this decree on the ground that the extension was unreasonable. *People ex rel. N. Y. & Queens Gas Co.* v. *McCall* (1916) 219 N. Y. 84, 113 N. E. 795.

It is well settled that the legislature has the power to regulate public service corporations, 2 Wyman, Public Service Corporations § 1407; *Munn* v. *Illinois* (1876) 94 U. S. 113, and can delegate this power to commissions. Wyman, *op. cit.* § 1408. The uniform rule has been that where the regulations made by the commission are of such a nature as to deprive the corporation of its property without due process of law, *Smyth* v. *Ames* (1898) 169 U. S. 466, 18 Sup. Ct. 418; *Atl. Coast Line* v. *N. C. Corp. Com.* (1906) 206 U. S. 1, 27 Sup. Ct. 585; *Minneapolis Gen. El. Co.* v. *Minneapolis* (C. C. 1911) 194 Fed. 215, or are clearly beyond the statutory power of the commission, *Schuster* v. *Met. Board of Health* (N. Y. 1867) 49 Barb. 450, or, *semble,* induced by fraud or mistake of law, *Sanford* v. *Sanford* (1890) 139 U. S. 642, 11 Sup. Ct. 666; see *Interstate Com. Comm.* v. *Union Pac. R. R.* (1911) 222 U. S. 541, 32 Sup. Ct. 108, such regulations may be declared null by the judiciary. But the courts agree with the principal case in denying themselves the power to pass upon the mere wisdom, expediency, or policy of such regulations as long as they are not confiscatory, illegal or fraudulent. *Interstate Com. Comm.* v. *Ill. Cent. R. R.* (1909) 215 U. S. 452, 30 Sup. Ct. 155; *King* v. *The Mayor* (1832) 3 B. & Ad. 255; see *State* v. *Great Northern Ry.* (1915) 130 Minn. 57, 153 N. W. 247. Since the reasonableness of an order depends not merely upon the pecuniary results to the corporation, as the lower court in the principal case held, *People ex rel. N. Y. & Queens Gas*

Co. v. *McCall* (App. Div. 1916) 157 N. Y. Supp. 707, but also on public convenience, *Atl. Coast Line* v. *N. C. Corp. Comm., supra*; *Wisconsin M. & P. R. R.* v. *Jacobson* (1900) 179 U. S. 287, 21 Sup. Ct. 115, and since it is wholly an administrative function to determine such matters, *State ex rel. R. R. etc. Comm.* v. *Great Northern Ry.* (1913) 123 Minn. 463, 144 N. W. 155; *Interstate Com. Comm.* v. *Ill. Cent. R. R., supra,* the principal case accords with reason and authority in denying the court power to assume administrative functions by substituting its judgment for that of the commission.

Real Property—Doctrine of Representation—Decree Binding Contingent Remaindermen Not in Esse.—In an action for partition and sale of realty, brought by the life tenants because the property was rapidly deteriorating in value, the question was whether a decree for sale would bind the contingent remaindermen not *in esse,* and hence not parties to the suit. *Held,* the interests of those not *in esse* were represented by the parties before the court, and would be bound by a decree of sale, directing that the fund received from the sale be held under the same limitations as those created by the will. *Coquillard* v. *Coquillard* (Ind. App. 1916) 113 N. E. 474, and *Coquillard* v. *Coquillard ibid.* 481. See Notes, p. 674.

Receiving Stolen Goods—Presumption of Knowledge From Possession—Reasonable Notice.—Under an indictment for receiving stolen goods knowing them to be stolen, the court charged: (1) that possession of the stolen goods imputes knowledge that they were stolen unless the defendant explains his possession; (2) that if the circumstances were such as to put a reasonable man upon such reasonable inquiry as would lead to a discovery that they were stolen, then the defendant is chargeable with knowledge. *Held,* both charges were erroneous. *Kasle* v. *United States* (C. C. A. 6th Cir. 1916) 233 Fed. 878.

The very essence of this crime at common law and under statutes is knowledge that the goods were stolen. 2 Bishop, New Criminal Law (8th ed.) § 1138; 2 Wharton, Criminal Law (11th ed.) §§ 1229, 1230. Recent possession of stolen goods under indictments for larceny raises an inference of guilt for the jury which must be rebutted by a satisfactory explanation of the possession. *Keating* v. *People* (1896) 160 Ill. 480, 43 N. E. 724; *Knickerbocker* v. *People* (1870) 43 N. Y. 177; 2 Russell, Crimes (7th ed.) 1308. Likewise, in the crime of receiving stolen goods knowing them to be stolen, recent possession in the accused with proof of a previous larceny are sufficient evidence to go to the jury as a fact from which an inference of guilty knowledge may be drawn; *Regina* v. *Langmead* (1864) 9 Cox C. C. 464; *People* v. *Weldon* (1888) 111 N. Y. 569, 19 N. E. 279; 2 Wharton, Criminal Law (11th ed.) § 1231; but, in no jurisdiction, has it been held that such circumstances form a presumption of guilt which the jury must, as a matter of law, follow unless satisfactorily rebutted. *State* v. *Richmond* (1905) 186 Mo. 71, 84 S. W. 880; *Castleberry* v. *State* (1896) 35 Tex. Cr. 382, 33 S. W. 875. Since the state must prove guilty knowledge as an essential element of the crime, reason as well as authority accord with the principal case in ruling that a bare possession establishes no legal presumption of guilty knowledge which the jury must follow. The majority view is also in accord with the holding that the second charge was reversible error. *Robinson* v. *State* (1882) 84 Ind. 452; *State* v. *Rountree* (1908) 80 S. C. 387, 61 S. E. 1072; *Cohn*

v. *People* (1902) 197 Ill. 482, 64 N. E. 306; *contra, Commonwealth* v. *Finn* (1871) 108 Mass. 466. Though such a charge might well apply to cases of civil liability where the test is negligence and lack of reasonable circumspection, it would seem to be difficult of application to criminal cases, where the test is solely personal criminal knowledge.

TAXATION—RAILROADS—CONCLUSIVENESS OF RETURN.—The railroad listed its taxable property with the auditor as required by charter. The auditor rejected the schedule, and put a higher value on the property. On an appeal afforded by the charter, a commissioner appointed by the court listed the property at twenty-five millions less than the railroad's valuation. It appeared that the railroad had used the wrong method of valuation. *Held,* on the grounds of public policy a taxpayer is bound by his own schedule in the absence of fraud, accident or mistake. *People* v. *Illinois Cent. R. R.* (Ill. 1916) 112 N. E. 700.

There is some diversity of opinion among the courts as to how far the doctrine of estoppel should be applied to a taxpayer who is required to furnish a statement of his property. In a majority of jurisdictions a taxpayer is estopped from questioning the correctness of his own return, in the absence of fraud, accident or mistake, on the theory that the state has acted on this return in levying the tax. *Slimmer* v. *Chickasaw County* (1908) 140 Iowa 448, 118 N. E. 779; *Inland Lumber Co.* v. *Thompson* (1905) 11 Idaho 508, 83 Pac. 933. Where no action has been taken by the state upon the taxpayer's own schedule, it is difficult to find the elements necessary to constitute an estoppel. *City of Charlestown* v. *County Comm'rs.* (1872) 109 Mass. 270. While, on account of the peculiar facts of the principal case the court is clearly correct in refusing to base its decision on the ground of estoppel, yet the case can scarcely be justified on the elastic basis of public policy. The public policy in not allowing a taxpayer to question his own schedule in the absence of fraud, accident or mistake is a pure rule of business administration to enable the state to conduct its finances with facility and certainty. But the purpose of a revenue law is "to take from each of the persons liable the just proportion which he ought to contribute to the public burdens; and it is neither justice nor sound public policy to seize upon advantages—if any should offer—to make one pay more than his just share". *Chicago & N. W. Ry.* v. *Auditor General* (1884) 53 Mich. 79. It is difficult to see how the patent injustice resulting from the decision in the principal case furthers the ends of sound public policy.

TRUSTS—CONSTRUCTION OF TRUST DEED—GIFT TO "WIDOW" GOES TO FIRST WIFE ONLY.—In contemplation of his son's marriage, a father conveyed land for the benefit successively of the son for life, of the son's widow for life, then of the son's children. The *cestui's* first wife predeceased him, leaving three children, and he remarried. *Held,* the children by the first marriage take to the exclusion of the second wife. *In re Solms' Estate* (Pa. 1916) 98 Atl. 596.

It is fundamental to the interpretation of both wills and deeds that the intent of the maker, as discoverable compatibly with other rules of law from the body of the instrument and the circumstances surrounding its execution, shall be carried out. Hawkins, Wills (2nd ed.) 6; 2 Devlin, Deeds (2nd ed.) § 836. A devise to the husband or wife of another, who has a spouse living at the date of the will, is by the great

weight of authority construed to apply to that spouse and no other, *Re Burrow's Trusts* (1864) 10 L. T. R. (n. s.) 184; *Van Brunt* v. *Van Brunt* (1888) 111 N. Y. 178, 19 N. E. 60; *Re Parrott* (1886) 33 Ch. D. 274, because with regard to ascertained beneficiaries, a will speaks as of its date. 1 Jarman, Wills (5th ed.) *302. But where the court finds it was not the intention to devise to a specific wife as an individual person, but to make provision for a surviving spouse *qua* survivor, any wife may take. *Wilmot* v. *DeMill* (Canada 1893) 32 New Brun. 8; *Peppin* v. *Bickford* (1797) 3 Ves. *570; see *In re Coley* [1903] 2 Ch. 102. This is the general rule in insurance policies where the wife is named as beneficiary. *In re Browne's Policy* [1903] 1 Ch. 188; *In re Parker's Policies* [1906] 1 Ch. 526. And on the same ground a gift to the "widow" has a broader application than a gift to the "wife", and includes such wife as may survive the person designated. *Meeker* v. *Draffen* (1911) 201 N. Y. 205, 94 N. E. 626; *Swallow* v. *Swallow's Adm'r.* (1876) 27 N. J. Eq. 278; *contra, Beers* v. *Narramore* (1891) 61 Conn. 13, 22 Atl. 1061; *Anshutz* v. *Miller* (1876) 81 Pa. St. 212. It would seem that the more liberal construction is based on sounder public policy and usually defers more nearly to the real intent of the devisor than the narrow interpretation. Certainly in the principal case the facts pointed strongly to an intention to make provision for any person who filled the status of surviving wife rather than to make a gift to a particular individual, and the holding seems extreme.

CURRENT LEGISLATION.

D. H. Van Doren, *Editor-in-Charge.*

Rights of Illegitimate Children Under Modern Statutes.—Under the early common law of England the lot of the child born out of wedlock was an intolerable one; he was regarded as *filius nullius,* having no right to inherit from either father or mother, no right to the surname of either parent, and no claim on them for support or education.[1] This stern policy has been defended as "to the encouragement of marriage and the discouragement of illicit intercourse";[2] but the surest proof that such punishment of the child for the wrongs of its parents had its real root in mediæval barbarism is furnished by the fact that modern English legislation imposes a liability for maintenance on the parents of bastards,[3] while in most American jurisdictions statutes facilitating their legitimation,[4] and giving them certain rights of inheritance,[5]

[1]See Hooper, Law of Illegitimacy, 25, 122, 135; Peck, Domestic Relations, § 123.

[2]See Clarke *v.* Carfin Coal Co. [1891] A. C. 412, 427, *per* Earl of Selborne.

[3]Thus, under the Poor Law Amendment Act of 1834 (4 & 5 Will. IV, c. 76, § 71), and that of 1844 (7 & 8 Vict., c. 101, § 6), a mother is punished for failure to support her infant illegitimate child, if she has the means to do so. Where a bastard child becomes chargeable to the parish, guardians may recover the cost of the relief from the father under Bastardy Laws Amendment Act, 1873 (36 Vict., c. 9, § 5); and in proceedings by the mother brought under Bastardy Act, 1872 (35 & 36 Vict., c. 65, §§ 3, 4, 5) a defendant adjudged to be the putative father of the child may be ordered to pay not exceeding 5s. a week for its maintenance and education until it attains 13 or 16 years. See Matthews, Law relating to Children and Young Persons, 376; Hooper, Law of Illegitimacy, 136-138.

[4]See, *inter alia,* Rev. Stat. Ariz. 1913, Civ. Code, § 1103 (subsequent marriage of parents legitimates); Mass. Rev. Laws 1902, p. 1267 (subsequent marriage *plus* acknowledgment by father); N. J. Laws 1915, c. 173 (subsequent marriage of parents *plus* treatment of child as their own); Park's Ann. Code Ga. 1914, Civil, § 3013 (court may declare child legitimate on petition of father); Rev. Codes Mont. 1907, § 4821 (adoption into father's family after marriage of parents legitimates); Rev Laws Nev. 1912, § 5833 (public acknowledgment by father, or reception into his family); Sess. Laws New Mex. 1915, c. 69 ("general and notorious" recognition by father, or in writing signed by father in presence of two competent witnesses.)

[5]Statutes of nearly all American jurisdictions give illegitimate children the right to inherit from the mother. See, *inter alia,* Code of Ala. 1907, § 3760; Fla. Comp. Laws 1914, § 2292; Hurd's Rev. Stat. Ill. 1915-1916, p. 980, § 2; Burns' Ann. Ind. Stat., Rev. of 1914, § 2998; Carroll's Ky. Stat. 1915, § 1397; Page & Adams Ann. Ohio Gen. Code 1910, § 8590; Hogg's West Va. Code 1913, § 3905. But in many states the right to represent the mother in inheriting from her kindred is denied. Comp. Laws Terr. of Alaska 1913, § 597; Deering's Civ. Code Cal. 1915, § 1387; Rev. Codes Idaho 1908, § 5703; Howell's Mich. Stat. 1913, § 10960; Gen. Stat. Minn. 1913, § 7240; Rev. Codes Mont. 1907, § 4821; Rev. Stat. Neb. 1913, § 1273; Pub. Laws No. Car. 1913, c. 71; Comp. Laws No. Dak. 1913, § 5745; Rev. Laws Okla. 1910, § 8420; Lord's Oregon Laws 1910, § 7351; Comp. Laws So. Dak. 1913, vol. 2, p. 194; Remington and Ballinger's Ann. Code Wash. 1910, § 1345; Wis. Stat. 1915, § 2274. In general, a bastard is not entitled to inherit from his father unless legitimated in some way

are also to be found on the books. The doctrine of *filius nullius*, however, has by no means lost its potency; save where expressly limited by statute, or by anomalous local precedent, it remains the law in English-speaking countries to-day.[6]

It is significant that the illegitimacy laws of few European nations equal in severity those of England and the other jurisdictions where *filius nullius* still holds sway. Whereas the liability of the father for the bastard's maintenance under the English statute is limited to the payment of an insignificant weekly sum,[7] the German Civil Code obliges him to accord to the child until the completion of its sixteenth year education and maintenance in accordance with the mother's station in life.[8] In France the issue of an incestuous or adulterous union can lay claim only to maintenance; but other illegitimate children are permitted, after compelling legal recognition by a court proceeding, to inherit one-half of the share to which a legitimate child would be entitled if the parents have also legitimate issue, three-quarters if there are only relatives other than descendants, and the whole of the inheritance if there are no other heirs.[9] The Belgian law is similar.[10] Under the Spanish Civil Code, all illegitimate children, where the paternity or maternity is sufficiently established, have a right to support; and natural children, who are defined as those born out of marriage of parents who, at the date of the conception of the child, could have married with or without dispensation, receive, if recognized by either parent, the right to bear that parent's name, and rights of inheritance corresponding broadly to those of legitimate issue.[11] In Switzerland children born in breach of marriage or in incest may not be legally recognized, but other illegitimates, if acknowledged by the father or successful in a suit to establish the paternity, may claim from the father maintenance to the end of the eighteenth year as well as a limited inheritance from him; and if it is established that the father promised marriage to the mother, or was guilty of a misdemeanor as to her at cohabitation, or abused his power over her, the child may claim the father's civil status, including his family name and domicile.[12]

It will be seen from the foregoing review that even progressive European countries have been slow to grant full family rights to illegitimate children. It remained for Norway, in the so-called Children's Rights laws of April 10, 1915, to take the initial step towards putting

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(see foot-note 4); but there seem to be some statutes under which acts of recognition by the father will give the bastard the right to inherit without necessarily legitimating him for other purposes. See, *inter alia*, Rev. Codes Idaho 1908, § 5703; Burns' Ann. Code Ind., Rev. of 1914, § 3000; Dassler's Gen. Stat. Kan. 1909, §§ 2955, 2956; Me. Rev. Stat. 1903, p. 664; Gen. Stat. Minn. 1913, § 7240; Comp. Laws So. Dak. 1913, v. 2, p. 194.

[6]See Peck, Domestic Relations, § 123; Hooper, Law of Illegitimacy, 100 *et seq.*

[7]See foot-note 3.

[8]Loewy, Civil Code of the German Empire (1909), § 1708.

[9]Carpentier, Code Civil (Paris 1914), §§ 340, 341, 756-764.

[10]Todd, Treatise on the Belgian Law (London 1905), pp. 71, 73.

[11]Código Civil Español (Spanish editions of Scaevola and Moreno, English edition of Walton), articles 114, 119, 134, 139-143, 840-847.

[12]Shick, Swiss Civil Code of Dec. 10, 1907 (1915), §§ 303, 304, 307-327.

bastards on an equal footing with legitimate issue. The Norwegian statute, among other subject-matters, enacts that a child whose parents have not entered into marriage with each other has a right to the family name of both father and mother, the right to inherit from both and from their relatives as if born in wedlock, and a claim on whichever of the parents has the care of it to maintenance and education in the same manner as if it were legitimately born.[13]

It is submitted that the Norwegian statute accomplishes in a direct and manly way a much-needed reform at which American courts and legislatures have hinted and connived, but to which they have not given their open support. The powerful presumption of legitimacy which the law raises even in cases where there is every indication of illicit conception,[14] the numerous statutes declaring legitimate the issue of marriages null in law or dissolved by divorce,[15] the almost universal tendency to give illegitimate children rights of inheritance from their mother and in case of legitimation or recognition from their father,[16] the equally prevalent method of charging the father with some portion of the expense of maintenance in bastardy proceedings instituted by the mother or the overseers of the poor of the township where the child has become a charge,[17]—all these things are a tacit acknowledgment of the inexpediency and injustice of disposing of the bastard with the summary brutality of the common law. It does not help to discourage illicit intercourse to allow the father to escape all responsibility for the maintenance and education of his illegitimate offspring. The holy institution of matrimony is not exalted, nor is the public weal advanced, by the creation of an anomalous pauper class, the issue of temporary unions where passion may be given full sway because the cares of paternity and the sharing of name and heritage do not accompany it. Only by holding parents strictly to account can promiscuous propagation be restrained by law; and only by granting to the unfortunate bastard the same rights against his progenitors to which his

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[13]See Article in *The Journal of the Society of Comparative Legislation*, New Series, no. XXXVI, pp. 284-296 (July, 1916).

[14]See Peck, Domestic Relations, § 105; Schouler, Law of the Domestic Relations, § 237 and note.

[15]See, *inter alia*, Kirby's Dig. Stat. Ark. 1904, § 2640; Park's Ann. Code Ga. 1914, Civil, § 2935; Rev. Codes Idaho 1908, § 5703; Gen. Stat. Minn. 1913, § 7105; Rev. Stat. Mo. 1909, § 342; Rev. Laws Nev. 1912, § 6117; Comp. Laws No. Dak. 1913, § 5745; Comp. Laws Utah 1907, § 2833.

[16]See foot-note 5.

[17]See, *inter alia*, Mills Ann. Stat. Colo., Rev. ed. 1912, §§ 421-426; Fla. Comp. Laws 1914, §§ 2598-2602; Hurd's Rev. Stat. Ill. 1915-1916, pp. 134-136; Rev. Stat. Me. 1903, pp. 833-834; Page & Adams Ann. Ohio Gen. Code 1910, §§ 12110-12135; Stewart's Purdon's Dig. of Stat. Law of Pa. 1905, pp. 955-957, as amended by Supplement to same, p. 5852; Gen. Laws R. I. 1909, pp. 354-357; Shannon's Ann. Code Tenn. 1896, §§ 7332-7353; Mass. Rev. Laws 1902, pp. 718-722, as amended by Supplement to same, pp. 642-644, and also by Acts of 1911, c. 53, Acts of 1912, c. 163, and Acts of 1913, c. 563. Although many American statutes leave it wholly in the discretion of the trial judges to what extent the child's father shall be charged with its maintenance in bastardy proceedings, some of them prescribe a maximum which is ridicuously small—thus in Arizona this must not exceed $600; in Florida not more than $50 yearly for ten years; in Tennessee not to exceed $40 for the first year, $30 for the second, $20 for the third; in Illinois the maximum is $100 for the first year, and $50 for nine succeeding years.

legitimate brother is entitled, can justice be done to him. It is to be hoped that the lead of the enlightened legislature of Norway will soon be followed by our Assemblies.[18]

THE KENTUCKY STATE FIRE MARSHAL LAW.—The annual fire loss of the United States is greater than that of any country in the world, and constitutes a serious continuing drain on our national resources.[1] Since 1901 twenty-two states have passed what may be classed as "State Fire Marshal Laws" in an effort to reduce this loss to an attainable minimum.[2] These laws usually give the State Marshal the power to investigate fires of suspicious origin, and to remedy dangerous conditions. They have failed materially to reduce losses,[3] largely because attention has been concentrated on the extermination of incendiarism rather than on the elimination of fires due to carelessness and ignorance.[4]

In view of these facts, a law passed this year in Kentucky is noteworthy.[5] This statute makes it the duty of the State Marshal, in cooperation with municipal officials, regularly to inspect buildings all over the State, and to abate dangerous conditions.[6] It gives him the power to make and enforce such regulations as will cause all structures to be "constructed, made and kept safe from loss or damage

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[18]A movement in this direction is already perceptible. In 1915 three bills were introduced in the Illinois Assembly, providing respectively for giving to every *child* the father's surname; making children born in and out of wedlock equally heirs of father and mother and their kindred; and providing for inheritance by illegitimate child from putative father whenever such paternity shall have been established. See Legislative Digest of 49th General Assembly. State of Illinois, H. B. 454, 455, 602.

[1]During the past ten years our average annual fire loss has approximated $250.000,000. Weeks, Avoidance of Fires, 14. One-half of this loss "arises from ignorant, shiftless, dirty and vicious use of property", and could be prevented by intelligent foresight. Official Record of the First Amer. Nat. Fire Prevention Convention, 285; Report of Fire Waste Committee, Chamber of Commerce of the U. S. A. This is proved by the fact that our annual fire loss per capita is ten times that of Western Europe; in 1913 it was $2.25 as compared with 33 cents for England, 49 cents for France, and 28 cents for Germany. Report of Fire Waste Committee, *supra;* Weeks, *supra,* 16. It is irrefutably established that this loss is largely preventable by the fact that careful inspection methods have reduced fire loss in Philadelphia by 28%, in New York by 20%, in Cincinnati by 40% and in other cities to an even greater extent. Report of Philadelphia Fire Marshal, January 1, 1914.

[2]See *e. g.* Ill. Laws 1909, p. 266; La. Acts 1914, No. 26, p. 81; Mich. Acts 1911, No. 79; Pa. Public Laws 658-664 (adopted 1911) etc. etc.

[3]For the past ten years the average loss by fire has remained substantially the same. See Weeks, *supra,* 18.

[4]Notwithstanding its broad powers, "the office of fire marshal concerns itself almost exclusively with attending fires and investigating their causes, prosecuting cases of suspected arson", and inspecting public buildings. "Practically no attention is given to the correction of . . . occupancy conditions that are chiefly responsible for an annual fire loss of approximately $3.500.000 in Philadelphia." Preliminary and First Annual Reports of Fire Prevention Commission of Philadelphia, 1912.

[5]Ky. Acts 1916, c. 19, §§ 27-49, approved March 15, 1916.

[6]*Id.* § 37; on the value of inspection, see note 1, *supra.*

or loss of life or injury to persons by fire".[7] The standards adopted by the State Marshal are to be a minimum requirement all over the State in the construction of buildings and in their protection from fire.[8] Finally, all owners are required to keep their buildings safe,[9] and no owner "shall require, permit or suffer the public or any employe to go or be in any such place which is not safe."[10]

The authority to promulgate rules and establish standards given to the Fire Marshal by this statute is so broad that it may lay its validity open to attack on the ground that it endeavors to delegate legislative power to a ministerial officer. The rule is that while the legislature may not delegate the power to make a law, it may delegate the power "to make rules and regulations for the purpose of applying and executing the law".[11] Since the law is a police measure, intended solely to protect life and property from damage by fire,[12] it would seem that the powers delegated to the Fire Marshal come under the second class, and are not open to objection. As a matter of public policy, the centralization of this power in the hands of a single expert would seem highly desirable; and from arbitrary or unreasonable rulings relief may be had by judicial intervention.[13]

That part of the statute which makes it the duty of every owner to keep his premises safe is salutary, because by increasing individual responsibility it will stimulate individual carefulness. The basis of liability is still negligence, as at common law, but by prescribing standards the statute makes that negligence which was not so before its enactment.[14] In the absence of such standards as the Fire Marshal may establish, the questions of whether or not an injury is due to negligence, and what constitutes negligence, will remain for the jury

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[7] *Id.* § 30b; § 42.

[8] *Id.* § 45. The First American N. F. P. Convention adopted in 1913 the following resolution: "It is the sense of this Convention that each of the several States should adopt a State building code with requirements which local governing bodies may raise but not lower by local enactment, said requirement to be enforced by proper governmental machinery over all of each and every State."

[9] *Id.* § 38.

[10] *Id.* § 39.

[11] 1 Sutherland, Statutory Construction (Lewis' 2nd ed.) § 89. In Dowling *v.* Insurance Co. (1896) 92 Wis. 63, 65 N. W. 738, it was said that "the true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law". See Arms *v.* Ayer (1901) 192 Ill. 601, 61 N. E. 851.

[12] Rhinehart *v.* State (1908) 121 Tenn. 420, 117 S. W. 508.

[13] II Report of Atty. Gen. (N. Y. 1912) 306.

[14] At common law the basis of liability for injury is the negligence of the person on whose premises the fire begins. 3 Shearman and Redfield, Negligence (6th ed.) § 665. But for an injury to an individual which is the proximate result of the owner's failure to have adequate fire escapes, for example, the common law imposes no liability. 1 Beven, Negligence (3rd ed.) 493. And for injury due to the owner's failure to keep on hand the proper means for extinguishing fire, there is a difference of opinion. 1 Beven, *supra*, 492; McNally *v.* Colwell (1892) 91 Mich. 527, 52 N. W. 70. That the statutory liability is still based on negligence, see Gorman *v.* McArdle (N. Y. 1893) 67 Hun, 484.

in each case;[15] but a certificate from the proper official will be *prima facie* proof that the owner has taken all necessary and reasonable steps to make his premises safe.[16]

One question remains: does an individual injured by a failure to comply with one of the provisions of such a statute have a cause of action? Although there is a difference of opinion in the United States, the weight of authority holds that he does.[17] This would seem the better view, since the intention is clearly not only to protect the body politic from injury, but also to make each man conform more strictly to the rule that he shall so use his property as to do no legal hurt to his neighbor.

In its inspection provisions, its centralization of control in the hands of a body of experts, its provisions for uniform standards of protection, and its creation of a high degree of individual responsibility, the Kentucky statute is extremely commendable and might well be followed in the other states.

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[15]Kohn *v.* Clark (1912) 236 Pa. 18, 84 Atl. 692.

[16]Kohn *v.* Clark, *supra.* Whether the duty to install adequate means of protection arises before any order has issued from the Marshal's office, is a moot question. The better considered cases and the weight of authority hold that it does. Carrigan *v.* Stillwell (1903) 97 Me. 247, 54 Atl. 389; Arms *v.* Ayer, *supra*; Arnold *v.* National Starch Co. (1909) 194 N. Y. 42, 86 N. E. 815; *contra,* Perry *v.* Bangs (1894) 161 Mass. 35, 36 N. E. 683.

[17]Gorman *v.* McArdle, *supra*; Willy *v.* Mulledy (1879) 78 N. Y. 310; see West *v.* Inman (1912) 137 Ga. 822, 74 S. E. 527; *contra,* Grant *v.* Slater Mill etc. Co. (1884) 14 R. I. 380.

BOOK REVIEWS.

HARRY ROTKOWITZ, *Editor-in-Charge.*

A HISTORY OF CONTINENTAL CRIMINAL LAW. By CARL LUDWIG VON BAR. Translated by Thomas S. Bell. Boston: LITTLE, BROWN & Co. 1916. pp. lvi, 561.

This book is one of the Continental Legal History Series published under the auspices of the Association of American Law Schools. The work is in the main a translation from the German of Von Bar's "Geschichte des Deutschen Strafrechts und der Strafrechtstheorien" which was published in Berlin in 1882. There are also additional chapters concerning the development of the criminal law in Scandinavia, Austria, Switzerland and France, which have been taken from the writings of six other authors, so that to this extent the history, as it appears in translation, is the composite result of the work of several hands.

The work of Von Bar, which composes the basis of the translated volume, was recognized on its publication in Germany as a leading work of its kind. The author who had served on the Appellate Court at Göttingen and subsequently held professorial chairs at Rostock, Breslau and Göttingen, was unusually well qualified for his task. Von Bar said that no history of criminal law of real value could be written except by one who had a first-hand knowledge of the individual details of his subject, and who did more than merely recast the work of others. Accordingly, we find that his statements are generally supported by references to original authorities, and that where the matter that he deals with is ancient, he sets out the original Latin or other foreign text on which he relies. Professor R. Loening, in the "Zeitschrift für die gesammte Staatrechtswissenschaft," Vol. 3, p. 473, says of Von Bar: "He is abundantly acquainted with the sources of his subject from his own inspection, and he is therefore qualified above everything else, to go to work in a critical manner, a thing which one so rarely finds among other writers on the history of criminal law." Every page of the work shows that this praise is well deserved.

Since the Roman Law so largely affected the Germanic criminal law, it is only natural that the author begins his work with an account of the Roman criminal law. He finds the origin of this, as of all other systems of criminal law, to have come from two sources. "One of these sources is the principle of *vengeance* as a retaliation for a wrong. The other source lies in the *subordination of the individual to some higher authority;* this authority, whether it be the family, the clan, the community, or even the state, is one which strives to maintain a certain degree of order for purposes more or less clearly defined." (p. 5) In the history of the Roman law, the author states that "private vengeance was suppressed at a very early period." This was first noticeable in crimes of violence, and in the early days, it seems that murder might be punished by the state with the penalty of death. (p. 12) In the statutes of the later Roman Republic, however, the death penalty was never mentioned, Cicero stating that the very thought of punishment by an executioner was unworthy of a Roman citizen and a freeman. (p. 29) As a matter of fact, the death penalty was tolerated at this period, but only as a kind of extra-legal necessity. (Ibid.) Under the Roman Empire, however, death became a frequent penalty, owing to the arbitrary and capricious power of the emperors. In many cases,

the punishment bore no proportion to the magnitude of the offense, as where under the Emperor Constantine, it was provided that any nurse or governess who aided in an abduction should have molten lead poured into her mouth. (p. 56.) The author concludes that "the principles of the Roman criminal law, excellent in many respects, had only an uncertain and precarious application. They were known to the jurists, but were never the absolute property of the people. . . . The genius of the Germanic peoples was able to reject the irrational elements and at the same time to make the fundamental principles the permanent property of the entire civilized world." (Ibid.)

The subsequent chapters of Von Bar's work deal with the development of primitive Germanic criminal law, and follow its history through the Middle Ages to modern times. It is interesting to note that neither in the Roman law nor in the early Germanic law was attempt punished as a separate offense, it being punished, if at all, under the head of the crime attempted rather than under any rational principle. (See pp. 41, 103, 130, 157.)

One of the most interesting and instructive chapters in the book is the one dealing with the Christian Church Law. (p. 79.) The Church, being interested in the moral welfare of its members, and having spiritual jurisdiction over sins, and imposing penalties for their commission, not unnaturally had a tendency to punish moral guilt which had lead to no external result that was injurious to the state. The punishments imposed upon heresy are an example of this tendency. The author brings out with great force the truth that it is only by punishing acts and not mere thoughts that we can have a sound system of criminal law. "The history of the criminal law of the Church offers an illustration of the truth that only by adherence to an objective or outward standard can steady development of the criminal law be obtained. By taking the external standard, it is possible to reach gradually a juster valuation of inward or personal guilt. If we are to hope to detect inward guilt by human agencies we must resort exclusively to external manifestations. . . . Exclusive regard for the moral element leads endlessly nowhere." (p. 92.) Nevertheless, the author gives the Church credit for calling attention to the importance of the subjective element in guilt and of contributing to penology "the idea of reformation implying that punishment should benefit the offender".

The succeeding chapters of Von Bar's work deal with the Renaissance, the Reformation and the reception by Germany of the Roman Law in the eighteenth century; a subsequent title follows on the French Revolutionary Period, and this is followed by a title dealing with the modern law. The second part of the book deals with the history of the theories of the criminal law from ancient to modern times. An appendix contains Von Bar's critique of the theory of criminal law, which is placed at the end of the book because the editors deemed it critical rather than historical in its treatment.

In regard to the chapters contributed by the other authors, it need only be said that they appear to be worthy to be placed in the company of such a distinguished writer as Von Bar. The editorial preface by Professor Wigmore is also a valuable contribution to the work. The translators have performed their work well, and have produced a book whose English is flowing and unstilted, a not too easy task in translating from the German. It may be said with confidence that the translated work is one of great and permanent value to the student of the history of the criminal law.

Ralph W. Gifford.

THE LAW OF THE PUBLIC SCHOOL SYSTEM OF THE UNITED STATES. By HARVEY CORTLANDT VOORHEES. Boston: LITTLE, BROWN & Co. 1916. pp. lvii, 429.

It must have required no little courage to undertake the task of so cordinating the usages and statutes of our different States, applicable to public schools, as to justify their presentation under the title of this volume. The meagre common law principles relating to the education of children have been superseded by constitutional and statutory provisions. As the federal government has no authority "to prescribe, limit or regulate the common schools of the several states", each commonwealth has been free to develop the public school system according to its own fancies, with resulting divergences which seem quite bewildering. However, Mr. Voorhees has been able to reduce this apparent chaos to a considerable degree of order, and has produced a book which deserves the title of "The Law of the Public School System of the United States" and which should prove most serviceable to all persons charged with responsibility in administering that system anywhere.

While the common law recognized the duty of the parent to educate his child, such duty was one of imperfect obligation, for no remedy was vouchsafed the child in case of the parent's neglect. This defect of the common law was the subject of earnest consideration by the early colonists, and, at present, every "State except Georgia and Mississippi" provides for the compulsory education of its children. Neither the common law nor modern legislation tolerates the claim once put forward by an English nobleman that "a parent has the right to go to the devil in his own way with his children". On the other hand, the State has such an interest in its children as to warrant its intervention on their behalf, compelling "parents to perform the natural duty of education owed to their offspring."

The chapter on School Districts is full of interest. Many of the cases cited supply admirable studies in the history of our educational system. Others are of great practical value to persons injured by these quasi-corporations, as well as to the inhabitants and officers of districts.

It is noticeable that our author has difficulty in formulating the rule of liability of an unconstitutional officer. This is not surprising, for the judicial deliverances are at variance on this subject, and practical considerations have been allowed to interfere with the logical application of the doctrine that an unconstitutional law is a nullity. As a result, Mr. Voorhees cites Connecticut and Wisconsin courts as holding that one elected under an unconstitutional statute to a valid office, is an officer de facto, whose acts are valid; while he cites the United States Supreme Court for the view that one holding an office created by an unconstitutional statute is a mere usurper, whose acts have no validity.

Francis M. Burdick.

NEW YORK ESTATES AND SURROGATES. By FRANK HUBBARD TWYEFFORT. Rochester: THE LAWYERS COOPERATIVE PUBLISHING COMPANY. 1916. pp. cxxiii, 1483.

The profession is much indebted to author and publishers for this new book. The law affecting the property rights which arise on the termination of a human life, and the procedure dictating the maintenance and preservation of those rights is necessarily peculiar to each state. The book under review deals with those rights from the stand-

point of estates having their *situs* in New York. There are a number of such books well-known to the profession. In the reviewer's opinion Mr. Twyeffort's book is superior to them. It has a logical arrangement. It takes up first, the rights which accrue at the moment of death; and it considers immediately the relevant problems of domicil, marriage, legitimacy, adoption and the status of aliens. It deals next with intestate succession, as being that form of succession which would legally occur in the absence of an act of the deceased; and then it takes up in praiseworthy detail the administration of assets. Then, wills and executors are treated; and the book leads us through chapters on testamentary trustees, and guardians and infants. Finally, in exhaustive chapters are taken up the jurisdiction and proceedings of the courts peculiar to New York State, known as Surrogates' Courts. Substantive law and adjective law are not muddled together in this book as in its predecessors or contemporaries. The substantive law is not merely stated, but it is stated fully, and with a great deal of detail and care. The means of asserting the rights which are defined in this book are likewise discussed with care, but in separate chapters. This avoids the necessity of describing what a petition is, or what a citation is whenever a right is to be enforced by means of such instruments; they are described once and for all in their proper place. Nor is there any confusion of the substantive law, because two varying provisions of substantive law are described (as they are in some books) in relation to "citations" merely because both may require a citation in aid of their enforcement. The chronological arrangement, which is the logical arrangement, will be of assistance to the practicing lawyer; so will the clearness of statement; and also, the cyclopaedic analyses which preface the volume will aid in quick reference. The book contains a full copy of all of the rules of the Surrogates' Courts, which was to be expected. The thing for which, perhaps, the profession will be most grateful to the author is the set of 244 forms which cover almost every conceivable proceeding in the Surrogates' Courts including transfer tax proceedings.

The book is written, of course, in view of, and perhaps because of, the new Surrogates' Act of 1914. Where its sections have been construed, the author sets forth the decisions with fullness; where they have not been construed, the author provides helpful analogies and discussion. The book is, therefore, of timely interest; but the reviewer finds it a relief that in a book dealing apparently chiefly with practice problems, the practitioner will find truly helpful discussions from the standpoint of substantive law, carefully prepared and logically arranged.

Alexander B. Siegel.

CLARK ON CORPORATIONS. Third Edition by I. MAURICE WORMSER. St. Paul: WEST PUBLISHING CO. 1916. pp. xiii, 913.

Nine years have elapsed since the publication of the second edition of Clark on Corporations. During that time, many new and interesting cases in the law of private corporations have been decided by the courts of this country and of England. For this reason alone, a new edition would have been justified. But the author of this third edition, not content with merely adding citations to some six hundred new cases, has revised the text of the old edition. While there are a few omissions, the revision consists chiefly in amplification, with the result that the reader, through the full discussion, obtains a clear and comprehensive view of the law relating to private corporations, which was to some extent obscured in the previous edition because of the

insufficient discussion of cases. Mr. Wormser has, in general, followed the chapter and section classification of the second edition; but there are a few changes, as, for example, in Chapter IV, on the relation between the corporation and its promoters. In that chapter the author has added a discussion of the functions and liabilities of the promoter and of the underwriter, which one should know; for the work of incorporation and the issuing of a prospectus inviting the public to subscribe to the stock of the corporation, are steps which involve important legal duties and obligations. The foot-notes, both in the discussion therein contained and in the citations to cases, are very full. References to New York and Federal cases, are abundant; and, of course, all the citations are brought down to date. It would, however, be much more convenient to both practitioner and student if the dates of the cases had been given together with those citations. It is often important to know just when a particular case was decided. Some of the decisions are cited in larger type than the others, for the purpose of facilitating the use of this book with Mr. Wormser's Case-book on Private Corporations. With the amplification of both text and foot-notes, the new edition contains about two hundred pages more than the second edition; yet through the general arrangement of the volume, there has been no increase in its bulk. The heavy type at the beginning of each section is larger and clearer, and the entire printed page seems easier to read than in the previous edition. Mr. Wormser's new edition brings a good book down to date; and makes it one of the best in the Hornbook Series, and a very useful and fairly complete book, considering its size, in the law of private corporations.

Books Received.

The Law of Interstate Commerce. By Frederick N. Judson. Third Edition. Chicago: T. H. Flood & Co. 1916. pp. xxix, 1066.

Cases in Quasi-Contract. By Edward S. Thurston. American Casebook Series. St. Paul: West Publishing Co. 1916. pp. xv, 622.

Cases on the Law of Real Property. Vol. III. Titles to Real Property. By Ralph W. Aigler. American Casebook Series. St. Paul: West Publishing Co. 1916. pp. xx, 953.

The Law of Wills. By George E. Gardner. Second Edition by Walter T. Dunmore. Hornbook Series. St. Paul: West Publishing Co. 1916. pp. xiii, 641.

Clark on Corporations. Third Edition by I. Maurice Wormser. Hornbook Series. St. Paul: West Publishing Co. 1916. pp. xiii, 913.

A Treatise on the Rescission of Contracts and Cancellation of Written Instruments. 2 Vols. By Henry Campbell Black. Kansas City: Vernon Law Book Co. 1916. pp. xxvi, 1779.

Reasonableness and Legal Right of the "Minimum Charge" in Public Utility Services. By Samuel S. Wyer. Columbus, Ohio: 1916. pp. 82.

German Legislation for the Occupied Territories of Belgium. Edited by Charles Henry Huberich & Alexander Nicol-Speyer. Fifth Series, October 2nd, 1915–December 31st, 1915. The Hague: Martimus Nijhoff. 1916. pp. 271.

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